IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-545

UNITED AIR LINES, INC.,
Petitioner,

vs.

LIANE BUIX McDONALD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604.

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Petitioner, United Air Lines, Inc. (herein "United") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 1, 1976.

OPINIONS BELOW.[1]

The Opinions and Orders of the District Court for the Northern District of Illinois of December 6, 1972 striking the class

1. Carole Anderson Romasanta was plaintiff in the trial court. The suit was settled and dismissed as to her and she was not a party to the appeal below, although her name appeared in the Court of Appeals caption as plaintiff. Liane Buix McDonald, respondent here, was petitioning intervenor in the trial court and appellant in the Court of Appeals. No. 75-2063. See App. A, A14.

action allegations, of October 3, 1975 dismissing the action after settlement with the named plaintiffs and intervenors, and of October 21, 1975 denying intervention to respondent are unreported and appear in Appendix A, A1-A13. The opinion of the Court of Appeals reversing the rulings of the trial court is reported at 537 F. 2d 915 (7th Cir. 1976) (Appendix A, A14-A25).

JURISDICTION.

The *per curiam* opinion by a divided panel of the Court of Appeals was entered on July 1, 1976. Petition for rehearing and suggestion of in banc rehearing was denied on September 1, 1976. The eight active judges of the Court of Appeals divided four-four on the suggestion of an in banc rehearing (Appendix A, A26). Jurisdiction is conferred on this Court by 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

1. Does the principle established in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974) that the applicable statute of limitations is suspended for putative class members only until class action status is denied apply to all class actions, including those brought under Title VII of the Civil Rights Act of 1964?

STATUTES INVOLVED.

The relevant portion of Section 706(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(e) is set forth below:

* * * * *

> Sec. 706. (e) A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred. . . .

The relevant portions of Rules 23 and 24 of the Federal Rules of Civil Procedure are set forth in Appendix B.

STATEMENT OF THE CASE.

Introduction.

The opinion of the majority of the Court of Appeals holds that it was error for the trial court to deny intervention by a putative class member three years after denial of class action status, two and one-half years after the applicable limitations period had run, and three weeks after final order of dismissal.

If the decision of this Court in *American Pipe & Construction* v. *Utah*, 414 U. S. 538 (1974), is of general application in class action litigation—as it appears to be—then the decision below should be summarily reversed.

In *American Pipe* this Court held that the filing of a class action tolls the running of the statute of limitations for putative class members, but only until class action status is denied. The trial court had held that the tolling was conditional upon a certification of class and that denial of class status "untolled" the limitations period as though the class suit had not been filed. Intervention had been denied by the trial court on the view that the statute of limitations had run out eleven days after the suit was filed, and since class status was eventually denied, intervention thereafter was untimely. Since intervention had been sought eight days after denial of class status, this Court held intervention to be timely. But, emphasized the Court (414 U. S. at 561):

> . . . the commencement of the class action . . . suspended the running of the limitation period *only* during the pendency of the motion to strip the suit of its class character. [Emphasis supplied.]

Justice Blackmun was concerned that extending the tolling for putative class members to the time of denial of class action had the potential for inviting stale claims. In concurring, he

observed that the trial judge could still exercise discretion in allowing intervention under the provisions of Federal Rule 24(b) even where the limitations period had not expired under the Court's decision. 414 U. S. at 561-62.

Background.

Until November 1968 it was the policy of petitioner United Air Lines that flight attendants had to be and remain unmarried as a condition of employment. This policy was abrogated at that time by agreement with the Air Line Pilots Association ("ALPA"), the bargaining agent for United's flight attendants.

Shortly thereafter one of the terminated flight attendants, Mary Sprogis, filed suit against United claiming the policy was a violation of Title VII of the Civil Rights Act of 1964.

In *Sprogis* v. *United Air Lines*, 444 F. 2d 1194 (7th Cir. 1971), *cert. den.* 404 U. S. 991 (1971), the Seventh Circuit affirmed the trial court's holding that the no-marriage policy did violate Title VII as discrimination in employment based on sex. The Court of Appeals remanded to the trial court the reserved question of whether the action—commenced as an individual suit—could be converted to class action after judgment. In June 1972, the trial court ruled that class action was not appropriate, primarily because of the prohibitions in Federal Rule 23 against "one-way intervention." 56 F. R. D. 420, 422-23 (N. D. Ill., 1972). No appeal was taken by plaintiff Sprogis or any putative class member, including the respondent here, from this decision.[2]

In May 1970, while *Sprogis* was pending on appeal, this action—*Romasanta* v. *United Air Lines*—was commenced as a class action by another former flight attendant apparently as a hedge against an adverse class determination in *Sprogis*. Both *Sprogis* and *Romasanta* were financed by ALPA, and plaintiffs in both suits were represented by the same counsel. Both cases were assigned to the same trial judge.

2. Plaintiff appealed only the denial by the trial court of attorney fees. *Sprogis* v. *United Air Lines*, 517 F. 2d 387 (7th Cir. 1975).

In December 1972, the trial court granted United's motion to strike the class allegations in *Romasanta* on grounds of lack of numerosity. Intervention on behalf of several former flight attendants was then timely sought. Respondent McDonald was not among them. Intervention was granted as to thirteen. Others were denied intervention. A4-A7. The named plaintiff unsuccessfully petitioned for appeal under 28 U. S. C. § 1292(b) from the denial of class action status. However, no effort was made to appeal from the order denying intervention, although that order was clearly final and appealable,[3] and although those denied intervention were also represented by the same counsel representing plaintiff Romasanta.

Discovery and various settlement discussions concerning plaintiff Romasanta and intervenors then ensued and on October 3, 1975—three years after class action status was denied—a final order dismissing the suit with prejudice was entered, all original and intervening claims having been "settled and resolved." A12.

Three weeks later, on October 21, 1975, petitioning intervenor McDonald—the respondent here—first came on the scene. Ms. McDonald is a former United flight attendant who had been terminated in September 1968 under the then existing no-marriage policy. She filed no grievance under the collective bargaining agreement, no charge with the Equal Employment Opportunity Commission ("EEOC"), participated in no litigation, and in no manner made known her belated claim that she was protesting the 1968 action of United. Her affidavit filed below acknowledges that she was fully aware of the *Sprogis* and *Romasanta* litigation from the inception, but she took no action of any kind until October 21, 1975.

On that day Ms. McDonald filed a motion to intervene for the purpose of appealing from the December 1972 order denying

3. As to the finality and appealability of an order denying intervention, see *EEOC* v. *United Air Lines*, 515 F. 2d 946, 948-49 (7th Cir. 1975).

class action status. The trial judge denied the motion to intervene as untimely:

> THE COURT: Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek relief from this Court in any way during that period of time, and litigation must end. I must deny this motion.

Ms. McDonald then appealed the denial of intervention and the December 1972 order denying class action status.

The Decision of the Court of Appeals.

On July 1, 1976, the Court of Appeals, in a two-one decision, reversed the trial court. The majority distinguished *American Pipe* in a footnote, on the ground that in Title VII actions the statute was tolled upon the filing of a charge with the EEOC—a *non sequitur* since the issue on appeal was not the commencement of the tolling of the 180-day limitation statute under Title VII, 42 U. S. C. § 2000e-5(e), but rather when the statute started running again. (A18, n. 6.)

Judge Pell, in dissenting, stated that under *American Pipe* the statute of limitations began to run again in December 1972 upon denial of class action status, and that Ms. McDonald had to act promptly thereafter "if she wanted to take advantage of this lawsuit as a forum for her claims." (A20.)

The eight active members of the Court of Appeals divided four-four on the suggestion for a rehearing in banc. (A26.)

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals is in direct conflict with a prior decision of this Court.

American Pipe held that the commencement of a class action suspended the running of the applicable statute of limitations "only during the pendency of the motion to strip the suit of its class character." 414 U. S. at 561.

Here intervention was sought three years after denial of class action status and at least two and one-half years after the limitations period would have run had it commenced running after class denial. Yet the majority decision below held the trial court erred in denying intervention as coming too late.[4]

The majority opinion disposed of *American Pipe* in a footnote:

> See also *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 551. The specific holding in *American Pipe* that the statute of limitations is tolled only during the pendency of the motion to certify a class and begins to run anew if the motion is denied *is not applicable here*. The statute of limitations in Title VII actions is suspended once one member of the class initiates the grievance mechanism. See *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F. 2d at 720. [Emphasis supplied.] (A18, n. 6.)

The reference to *Bowe* is irrelevant: the holding of *Bowe* (and other cases) that the filing of an EEOC charge tolls the statute of limitations for all putative class members was never challenged here and is not the issue. The issue is when does the

4. Under Title VII, the complainant must file a charge with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory act as a prerequisite to filing a lawsuit. 42 U. S. C. § 2000e-5(e). Assuming Romasanta's filing of an EEOC charge followed by her filing this action tolled the statute of limitations with respect to respondent's claim, the statute would nevertheless begin to run again from the December 6, 1972 order denying class status. Thus the maximum statutory period for respondent would have been 180 days from the December 6, 1972 date, or June 4, 1973.

statute begin to run again. *American Pipe* teaches that it commences to run when class status is denied.

In the opening sentence of its opinion in *American Pipe*, this Court stated: "This case involves an aspect of the relationship between a statute of limitations and the provisions of Fed. Civ. Proc. Rule 23 regulating class actions in the federal courts." 414 U. S., at 540. There is no suggestion in the decision that it is applicable only to this relationship in anti-trust class actions, or applicable to all class action litigation except that under Title VII.[5] Nor does the majority decision below advance any sound reason for not applying the *American Pipe* doctrine in civil rights litigation.

Although not specifically addressing the issue as to when the statute of limitations would commence running, the majority implied that the statute continues to be tolled until the "champion of the class . . . abdicates." (A18.) "Abdication," held the court, did not occur until three weeks after the final order of dismissal of October 3, 1975, when the individual plaintiffs who had settled all their claims allegedly advised Ms. McDonald they had decided not to appeal the class action denial.[6] (A17, 18.)

5. Title VII class action suits are not exempt from the requirements of Rule 23. *E.g., Nance* v. *Union Carbide Corp.*, ... F. 2d ....., 13 FEP Cases 231, 234 (4th Cir. 1976). *See also, Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 499 (5th Cir. 1968); *Crockett* v. *Green*, 534 F. 2d 715, 717-18 (7th Cir. 1976); *Wright* v. *Stone Container Corp.*, 524 F. 2d 1058 (8th Cir. 1975); *Black* v. *Central Motor Lines*, 500 F. 2d 407 (4th Cir. 1974).

6. This test enunciated by the majority makes the running of the limitations period dependent on the state of mind of the named plaintiffs and the exchange of information between plaintiffs and putative class members, hardly objective factors upon which to base a principle of class action administration. The opinion does not tell us how "abdication of the champion" would be established if the plaintiffs and putative class members were not in communication. Would the putative class members have a duty to seek out plaintiffs to ascertain their intentions? Would there be a hearing to determine if, when and how the putative class members learned of the "abdication"? If the putative class members first learned that the plaintiffs did not intend to appeal because time for filing notice of appeal had expired would a motion to intervene still be timely? By introducing this subjective test the majority opinion creates a host of problems under the Federal Rules, apart from the conflict with *American Pipe.*

This simply begs the question. Action or inaction by the named plaintiff, the "class champion," is not the issue. If the statute of limitations started running after denial of class action in December 1972—as *American Pipe* holds—then Ms. McDonald had to rely on herself from then on. There no longer was a "champion." She had six months in which to seek intervention, and, if unsuccessful, to appeal. She was in no different position than would have been the intervenors in *American Pipe* if they had waited four more days until after the statute of limitations had run out, to file intervention petitions. Indeed, this is exactly what happened to those attempting to intervene only 40 to 44 days after class action status denial in *Monarch Asphalt Sales Co.* v. *Wilshire Oil Company*, 511 F. 2d 1073 (10th Cir. 1975). There the Court of Appeals, relying on *American Pipe*, affirmed the trial court ruling denying intervention because the limitations statute, tolled until the adverse class determination, began running again and expired prior to the time the intervention petitions were filed. *See also Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171, 176-78 (5th Cir. 1975), *cert. den.* 96 Sup. Ct. 1508 (1976).

The majority argues that the petition to intervene after final judgment in October 1975 was "timely" under Rule 24(b) because Ms. McDonald did not learn until that time that the named plaintiffs would not appeal from the final order. (A17.) But Rule 24 cannot operate to enlarge the statute of limitations: as Justice Blackmun pointed out in his concurring opinion in *American Pipe*, the Rule may be used in the discretion of the trial court to deny intervention where the statute has *not* run. Where, as here, the petition to intervene is filed after the statute of limitations has run, it is clearly untimely.

Finally, the majority sought to justify its holding for the reason that "To hold otherwise would permit one member of the class to obtain benefits greater than other members." (A18.)

But this is the effect of timeliness requirements and statutes of limitations in all litigation, including class actions. That is precisely what *American Pipe* is all about. Relief is denied to those who have slept on their rights. Disputes must end sometime, and rights not timely asserted are lost. The majority's observation does not distinguish *American Pipe:* it argues with it.[7]

Judge Pell in his dissent put the issue succinctly (A24-25):

> When a class action is denied, former putative class members may not ignore this fact and continue on the assumption the suit is a class action . . . as does petitioner. The denial of class status is a critical point which puts putative class members on notice that they must act to protect their rights. The tolling procedure established by the Supreme Court in *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538 (1974), would have no meaning without its corollary requirement that as soon as the class is decertified, former class members who want relief must "make timely motions to intervene." (414 U. S. at 553.)

7. Indeed, ~~this Court's~~ the Seventh Circuit's ruling creates the anomalous situation where parties who unsuccessfully brought their own suits to protest United's former no-marriage rule are now barred by the statute of limitations and *res judicata* from being granted relief while respondent and other putative class members at this time unknown, who have done nothing for a least seven years, may now seek recovery. Several former United stewardesses who had been terminated because of the no-marriage rule filed an action in 1971 in the United States District Court for the Central District of California. The trial court denied relief because the plaintiffs, who had been terminated in 1966 and 1967, had not filed timely charges in accordance with the provisions of Title VII. *Buckingham* v. *United Air Lines, Inc.,* Civil No. 71-731-LTL. In addition, Doris Collins, who resigned in May, 1967, filed a charge with the EEOC in November, 1971 and instituted an action in the Western District of Washington in November, 1972. She was denied relief by the trial court because her charge was not timely filed. This action by the trial court was affirmed by the Ninth Circuit in *Collins* v. *United Air Lines, Inc.,* 514 F. 2d 594, 596 (9th Cir. 1975). Because of the lawsuit pending at that time in the District Court, Collins was denied intervention in this case below. And, in reliance on the *Collins* opinion, summary judgment was granted on August 5, 1975 by the trial court below against Lynn Mason Raymond, a putative class member who had been allowed to intervene in 1972. This dismissal was not appealed.

Class actions under Title VII and other civil rights statutes are proliferating. It is of the utmost importance that this Court clarify the ambiguous state in which the majority decision below leaves the issue. If the decision below is allowed to stand it will frustrate the policy of Title VII to encourage conciliation and voluntary settlement. See 42 U. S. C. § 2000e-5(b).[8] No Title VII class action suit can be settled where class status is denied. A defendant cannot know with whom it can settle until after appellate review of the class action denial.[9] The trial court will be severely handicapped in management of the suit, for the court will never know when putative class members—like the intervenor here—may someday simply appear.

If *American Pipe* applies to all class actions—as it appears to—then the decision of the court below should be reversed. If this Court meant something other than what appears from the plain language of its decision then guidance is imperative

8. The Seventh Circuit Court of Appeals itself recognized this policy in an earlier decision. ". . . As a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where 'there is great emphasis . . . on private setttlement and the elimination of unfair practices without litigation.' " *ALSSA* v. *American Airlines,* 455 F. 2d 101, 109 (7th Cir., 1972), citing *Oatis* v. *Crown Zellerbach Corp.,* 398 F. 2d 496, 498 (5th Cir. 1968).

9. The majority opinion refers to *Anschul* v. *Sitmar Cruises, Inc.,* ..... F. 2d ....., 21 Fed. R. Serv. 2d 946 (7th Cir. 1976) to the effect that named plaintiffs may not appeal denial of class action status at time of denial but must await final order (A15, n. 3). The point is not relevant since the issue here is the status of putative class members who are out of the case after denial, not named plaintiffs for whom the case survives as an individual action. In any event, the right of a named plaintiff to appeal denial of class action after final judgment may be waived as a result of settlement. This was recognized by the Seventh Circuit in *King* v. *Kansas City Southern Industries,* 519 F. 2d 20, 27 (7th Cir. 1975). That is precisely what happened here. The final order was one of dismissal with prejudice, all matters "having been settled and resolved." A12. Here the plaintiff and prior intervenors could not appeal class action denial because of the agreed settlement order. This was the risk respondent took in not acting in her own interest promptly after denial of class action status in December 1972.

to spell out precisely what the status of putative class members is after denial of class action in various types of suits, including Title VII suits.

We respectfully submit that there is nothing unique about a Title VII class action which distinguishes it from class actions based on any other statute; this Court suggested no such difference in *American Pipe;* no reason advanced by the court below supports such a distinction.

CONCLUSION.

For the foregoing reasons, we respectfully request that this petition for a writ of certiorari be granted, and that the decision of the court below be summarily reversed on the authority of *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538 (1974).

Respectfully submitted,

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:

MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
(312) 782-0600.

October 20, 1976.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLE ANDERSON ROMASANTA and BRENDA BAILES ALTMAN,
Plaintiffs,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant.

No. 70 C 1157.

MEMORANDUM AND ORDER

Plaintiffs Carole Anderson Romasanta and Brenda Bailes Altman are former stewardesses employed by defendant United Air Lines, Inc. ("United"). They allege they have been subjected to discrimination because of their sex with respect to conditions and privileges of their employment. Their action challenges the validity, under Title VII of the Civil Rights Act of 1964, of United's policy that stewardesses in its employ be and remain unmarried.

The suit was brought as a class action to secure relief similar to that granted by this court in *Sprogis* v. *United Air Lines, Inc.,* No. 68 C2311. On January 21, 1970 in its decision in *Sprogis,* this court found that United's enforcement of its no-marriage policy for stewardesses resulted in her discharge and discriminated against Mrs. Sprogis because of her sex. It ordered, among other things, the taking of an accounting as to her claim for compensation for lost pay. United appealed. On

June 16, 1971 the Court of Appeals affirmed this court's ruling in *Sprogis* and on December 14, 1971 the Supreme Court denied United's petition for writ of certiorari.

Approximately four months after this court's decision in *Sprogis* the complaint in this case was filed on May 15, 1970. In *Sprogis* the court had left open the question as to whether the relief afforded Mrs. Sprogis should be made applicable to other stewardesses discharged by United pursuant to its no-marriage policy. The *Romasanta* case was held on the court's past case calendar while disposition of Sprogis was pending in the courts above. Upon remand the court considered the issue of whether class relief was appropriate in *Sprogis* and a motion to consolidate *Romasanta* with *Sprogis*.

In its Memorandum and Order of June 14, 1972, the court denied the motion to convert *Sprogis* into a class action and to consolidate it with *Romasanta* for reasons in its Memorandum and Order set forth. Among other things the court therein pointed out that after it appeared Mrs. Sprogis was to have relief the Romasanta action was brought here and other stewardesses sought to benefit *after a decision on the merits*. The court found it would be unjust to defendant to allow one-way intervention for if class relief were extended, it was probable no class member would decline to join in a chance for monetary reward once the discrimination issue had been determined. However, it again pointed out that the relief granted on the discrimination issue in *Sprogis*, if found applicable, could be extended to other stewardesses but that they must present their cases on the merits. The court specifically stated that its views were in no way prejudicial to the eventual disposition of the *Romasanta* case on its merits. (The *Sprogis* case is now continuing as an individual action for the purpose of determining her lost pay.)

Defendant United has moved the court to strike all allegations of the *Romasanta* complaint relating to class action and to direct the matter to proceed as an individual action on behalf of

plaintiffs Carole Anderson Romasanta and Brenda Bailes Altman. At subsequent hearings the court indicated it was of the opinion the action should not proceed as a class action although it would allow additional stewardesses to intervene by way of joinder as addition[al] parties plaintiff if their joinder is proper. Thereafter a motion to intervene was filed by 24 individuals.

The court has considered the motion to strike the class allegations and the motion to intervene, the memoranda of counsel for the parties and those affidavits and exhibits submitted. It has heard argument of counsel at several hearings. It now is of the opinion those individuals allowed to join in this action should be limited to all former stewardesses who resigned or who were terminated because of United's said policy between July 2, 1965 and November 7, 1968 and who thereafter protested the no-marriage policy or termination by filing a valid grievance under the applicable bargaining agreement between United and the Air Line Pilots Association ("ALPA") or a valid complaint with the Equal Employment Opportunity Commission ("EEOC") or any appropriate State agency. It will exclude, however, any present or former stewardess of United who has accepted an offer of reinstatement pursuant to the agreement between United and ALPA, or any stewardess who voluntarily withdrew or abandoned her claim, or who pursued any other administrative or judicial remedy to conclusion.

Involved here are some stewardesses who resigned because of marriage and did protest the no-marriage policy of United by filing grievances under the collective bargaining agreement between defendant and ALPA or by filing charges under Title VII. Defendant contends others did not protest and it is reasonable for the union and defendant United to assume that since they did not protest they had no further interest in further employment. It appears to the court intervenors should be limited to those who protested, did not settle and were truly interested in employment.

On November 7, 1968 United revoked its no-marriage policy by agreement with the Air Line Pilots Association, the authorized collective bargaining representative of the stewardesses in United's employ. Under the agreement United offered reinstatement to all stewardesses terminated as a consequence of the no-marriage policy and who had filed a valid grievance under the collective bargaining agreement or a valid complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 or before State agencies. Said Letter of Agreement stated, in part: "Acceptance of reinstatement will be in full satisfaction of any grievance or complaint filed by such stewardesses."

According to the defendant, 30 stewardesses qualified for and were offered reinstatement under the said agreement; eleven accepted; three tendered resignations; two did not respond and United received no further communication from them. Some instituted civil actions. Three of the 30 now have claims pending before the State of New York Division of Human Rights.

Defendant in its response to the motion of the 24 to intervene does not object to the intervention as plaintiffs of eight stewardesses. The court, therefore, will grant the motion to intervene of these eight, namely, Sandra Moore Ballinger, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn and Mary O'Connor Whitmore. It appears these eight individuals protested their termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between United and ALPA, of which they were members. Some of them also filed charges with the EEOC. As to Marlene Riehl Carney it appears that a dispute has been resolved as to whether she did nor did not file a grievance under the collective bargaining agreement, and upon a hearing defendant indicated no objection to her joinder. Marlene Riehl Carney is therefore added as an additional party plaintiff.

Defendant objects to the inclusion of seven stewardesses on the grounds that they accepted reinstatement in full satisfaction of any grievance or complaint they had pursuant to the agreement aforesaid between United and ALPA. Plaintiffs' attorney argues the acceptance of reinstatement does not preclude them from pursuing their remedy under Title VII. They accepted reinstatement in full satisfaction of their grievance. The motion to intervene is denied as to these seven, namely, Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala, Patricia M. Moon, Janice Schmidt Rensch and Jeanette Byers Schlau.

Three others of the 24 seeking to intervene here, namely, Mary Weis, Helen Read Gunst and Diane M. Welty, have filed charges with the New York Division of Human Rights against United. Upon hearing it appears the issues of liability has already been determined there and that the issue of the amount of such liability is being determined. Although counsel argues that these three should be included in the suit here until such time as the settlement of their claims is actually consummated and "scrutinized" by this court, it is sufficient that they are pursuing their remedies to near conclusion elsewhere. Their exclusion does not preclude their bringing their own action if the settlements are not consummated. The motion of Mary Weis, Helen Read Gunst and Diane M. Welty to intervene in this action is denied.

Upon hearing it was also determined Doris Rivas Collins has filed an action in the District Court of Washington at Seattle. She is pursuing her judicial remedy elsewhere and her motion to intervene in this action is also denied.

To its response to the motion to intervene, United attached copies of letters from Evelyn A. Ambrose in which she accepted an offer of reinstatement pursuant to the United and ALPA agreement. United further represents that she did not wish reinstatement but was withdrawing her grievance. In her case plaintiffs' attorney contends that her acceptance did not have the

effect of precluding her from pursuing a remedy under Title VII and denies that her acceptance without reinstatement constituted a binding waiver or revocation of her rights. Mrs. Ambrose accepted an offer of reinstatement and withdrew her grievance. Her motion to intervene here is denied.

The facts as to the situations of the three remaining who seek to intervene are more in controversy. United objects to the inclusion here of Rita Gardino Trubshaw on the ground she made no response to a letter of November 14, 1968 offering her reinstatement and did not communicate with United and it contends she therefore abandoned her claim. This is disputed. In Mrs. Trubshaw's case it is contended that she notified United of her rejection of the offer, that she did not receive a second unconditional offer of reinstatement and that she did not withdraw her grievance or abandon her claim. In the case of Lynn Mason Raymond defendant objects on the ground she did not file a valid grievance under the collective bargaining agreement nor, to its knowledge, with the EEOC. It appears her employment was terminated in 1966. Attached to plaintiff-intervenor's reply is an exhibit showing Mrs. Raymond did file charges with the EEOC and that the District Director of the EEOC made findings relative to her complaint. Defendant also objects to the inclusion of Joanne Fitzgerald Hamersley on the ground that it has no knowledge she filed a valid grievance under the collective bargaining agreement or with EEOC. It appears from the exhibits Mrs. Hamersley did file charges of discrimination with the EEOC in November and December 1970. She sets forth she resigned voluntarily December 23, 1967 because she was getting married.

The court will allow these three, namely, Rita Gardino Trubshaw, Lynn Mason Raymond and Joanne Fitzgerald Hamersley to join in this action.

In considering the equities, it does not seem fair and reasonable to this court that it should allow a stewardess terminated prior to November 7, 1968 to intervene here unless she indi-

cated in a timely manner her desire to continue working by taking some affirmative action to protest United's policy or seek reinstatement.

Attorneys for plaintiffs say they have made every effort to communicate with all persons who may be eligible to intervene in this action as plaintiffs as authorized by this court on September 11, 1972 but have been unable to locate seven persons of whom they are aware. They request the court to allow them to pursue their efforts to locate these persons by publishing notices in newspapers in various stewardess domiciles and then to allow them to intervene as they may be located. That part of the motion to intervene is denied.

It is ordered that all allegations of the complaint relating to class action be stricken and that this action not proceed as a class action. The class of plaintiffs who protested their termination does not meet the numerosity requirement of Rule 23(a) of the Federal Rules of Civil Procedure. Those individuals whose motions to intervene are being granted will come in by way of joinder as additional parties plaintiff. Based on the controversies already evident between counsel on the fact situations as to various stewardesses, the court is more than ever convinced a class action would not be expeditious or efficient. The court itself has attempted to chart the situations as to each of the 24 individuals seeking to intervene, and based on only what is before it is more than ever convinced that it has a series of individual suits within a suit, that the merits may vary from individual to individual, that all are not similarly situated.

The motion to intervene is granted as to Sandra Moore Ballinger, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn, Mary O'Connor Whitmore and Marlene Riehl Carney. It is denied as to Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala, Patricia M. Moon, Janice Schmidt Rensch, Jeanette Byers Schlau, Mary Weis, Helen Read Gunst, Diane M. Welty, Evelyn A. Ambrose and

Doris Rivas Collins. The motion to intervene as it relates to Rita Gardino Trubshaw, Lynn Mason Raymond and Joanne Fitzgerald Hamersley also is granted. Defendant United is ordered to answer within twenty days.

The court is of the opinion that its order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from its order may materially advance the ultimate termination of the litigation.

ENTER:

/s/ J. S. PERRY

Judge

Dated: December 6, 1972.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

CAROLE ANDERSON ROMASANTA, et al.,
Plaintiffs,
vs.
UNITED AIRLINES, INC.
Defendants.
No. 70 C 1157

ORDER

This matter coming before the Court for the entry of a final order and the Court being fully advised of all relevant circumstances, the Court finds as follows:

A. This lawsuit was filed in 1970 as a class action on behalf of all United Air Lines, Inc. stewardesses who were discharged on account of marriage, alleging that their discharges constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e *et seq.*). In a memorandum opinion dated December 6, 1972, this Court ordered that the class action allegations of the complaint be stricken and that certain persons be allowed to intervene as Plaintiffs. In addition to the named Plaintiffs, Carole Anderson Romasanta and Brenda Bailes Altman, intervention was granted for Plaintiffs Sandra Moore Ballinger Hoiles, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn, Mary O'Connor Whitmore, Marlene Riehl Carney, Rita Gardino Trubshaw King, Lynn Mason Raymond and Joanne Fitzgerald Hamersley. The Court denied the motions to intervene of Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala,

Patricia M. Moon, Janice Schmidt Rensch, Jeanette Byers Schlau and Evelyn A. Ambrose, on the ground that these individuals accepted reinstatement in full satisfaction of their grievances. The Court also denied the motions to intervene of Mary Weis, Helen Read Gunst, Diane M. Welty and Doris Rivas Collins on the ground that these individuals had similar actions pending elsewhere. Subsequently, on April 25, 1973, this Court granted the motion to intervene of Carol Paglia Barounes.

B. After this Court's rulings in the companion case entitled *Sprogis* v. *United Air Lines, Inc.*, Case No. 68 C 2311, holding that Defendant United Air Lines, Inc. had violated Title VII of the Civil Rights Act of 1964 when it discharged Plaintiff Sprogis on account of her marriage (308 F. Supp. 959 (N. D. Ill. 1970), aff'd. 444 F. 2d 1194 (7th Cir. 1971), cert. den. 404 U. S. 991 (1971)) and subsequently affirming the recommendation of Special Master David Shipman as to the amount of damages which Plaintiff Sprogis was entitled to recover from Defendant United Air Lines (memorandum opinion of June 10, 1974, aff'd. 517 F. 2d 387 (7th Cir. 1975)), counsel for the parties in this case negotiated settlements of the claims of Plaintiffs Susan Fusco, Mary Whitmore, Rita King, Marlene Carney, Carol Barounes, Judith Pendleton, Terry Van Horn, Brenda Bailes Altman, Carol Elaine Brackle, Sandra Hoiles, Carole Romasanta and Joanne Hamersley. In such negotiations the rulings of this Court in *Sprogis* with respect to back pay were applied. In particular, in their negotiations, counsel in good faith applied this Court's ruling in *Sprogis* with respect to the following:

a. As to any Plaintiff who had not been reinstated to her former position as Stewardess, the parties commenced their negotiations by deciding her right to reinstatement;

b. Each Plaintiff's entitlement to back pay was based upon the monthly base-pay rate for stewardesses in the relevant collective bargaining agreement, plus ten hours of overtime pay per month;

c. Computations of each Plaintiff's maximum entitlement to back pay were made by computing the back pay from the date of each Plaintiff's discharge to the date of her reinstatement, deducting all interim earnings;

d. As to any Plaintiff who was pregnant during the claim period, back pay was deducted for an eight-month period of pregnancy.

e. Appropriate consideration was given by the parties to the question of whether each Plaintiff sought interim employment with reasonable diligence; and

f. Each Plaintiff except Carole Romasanta recovered interest on the agreed back pay award, computed on a quarterly earnings basis at the rate of six per cent per annum.

C. The parties were unable to reach agreement with respect to two of the Plaintiffs and with respect to these two Plaintiffs the Court issued the following orders:

a. On July 3, 1975, this Court ordered the reinstatement of Plaintiff Sarah Ann Boling with 7½ years of seniority and without any back pay or other compensation.

b. On August 5, 1975, this Court granted Defendant United Air Lines' motion to dismiss the complaint as to Plaintiff Lynn Mason Raymond.

D. Plaintiff Catherine Reese Colvin has moved for leave to withdraw as a Plaintiff in this action, and to waive any claim to relief herein.

E. All matters affecting the claims of each of the 15 Plaintiffs relating to reinstatement and back pay have now been resolved. The only issue remaining concerns the propriety of an award of attorneys' fees and costs pursuant to Section 706(k) of the Civil Rights Act of 1964 as amended (42 U. S. C. § 2000e-5(k)).

IT IS THEREFORE ORDERED:

1. That the complaints of Plaintiffs Susan Fusco, Mary Witmore, Rita King, Marlene Carney, Carol Barounes, Judith Pendleton, Terry Van Horn, Brenda Bailes Altman, Carol Elaine Brackle, Sandra Hoiles, Carole Romasanta and Joanne Hamersley are hereby dismissed with prejudice, all matters in controversy with respect to such claims having been settled and resolved.

2. That the complaint of Plaintiff Catherine Reese Colvin is dismissed with prejudice.

3. That the Court expressly reserves jurisdiction for the purpose of considering an application for attorneys' fees and costs, which application Plaintiffs' counsel shall file within twenty days hereof.

ENTER:

/s/ J. S. PERRY
Judge

Dated: October 3, 1975

UNITED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Joseph Sam Perry

Cause No. 70 C 1157 Date October 21, 1975

Title of Cause—Carole Romasanta et al. v. United Air Lines, Inc.

Brief Statement of Motion—Petition of Liane Buix McDonald to Intervene for Purposes of Taking an Appeal is hereby denied.

Names and Addresses of moving counsel—Thomas R. Meites, 33 N. Dearborn, Suite 920, Chicago, Ill. 60602, attorney for petitioner.

Names and Addresses of other counsel entitled to notice and names of parties they represent.—James Gladden, Jr., Mayer, Brown & Platt, 231 S. LaSalle, Chicago, Ill. 60604, attorney for defendant; Richard Watt, Cotton, Watt, Jones, King & Bowlus, One IBM Plaza, Suite 4750, Chicago, Ill. 60611, attorneys for plaintiffs.

Enter Order.

Perry
Oct. 21, 1975

IN THE UNITED STATES COURT OF APPEALS,
for the Seventh Circuit.

No. 75-2063

CAROLE ANDERSON ROMASANTA, ET AL.,
Plaintiffs,

vs.

UNITED AIRLINES, INC., a corporation,
Defendant-Appellee,

LIANE BUIX MCDONALD, on her own behalf and on behalf of others similarly situated,
Petitioning Intervenor-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division No. 70 C 1157.

J. SAM PERRY, *Judge.*

ARGUED FEBRUARY 17, 1976—DECIDED JULY 1, 1976

Before FAIRCHILD, *Chief Judge*, CUMMINGS and PELL, *Circuit Judges.*

PER CURIAM. This case is related to *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), certiorari denied, 404 U. S. 991, where we held that United's policy of refusing to employ married stewardesses was discrimination based on sex in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. §§ 2000e-2(a)(1). During

the pendency of the *Sprogis* appeal, Carole Romasanta[1] filed the present suit on behalf of herself and other United stewardesses who were similarly discharged. Appellant Liane McDonald ("petitioner") was a member of the putative class in *Romasanta.*

On December 6, 1972, while defendant was still denying liability, the district court filed a memorandum opinion and order that this case should not proceed as a class action. However, the court permitted twelve former stewardesses to intervene "by way of joinder as additional parties plaintiff" since they had protested defendant's no-marriage rule by filing a grievance under the collective bargaining contract or by complaint to the Equal Employment Opportunity Commission or a comparable state agency. Petitioner and 140 other stewardesses[2] were thus excluded from the case.

On July 3, 1974, the district court granted the plaintiffs' motion for summary judgment and appointed a special master to recommend the compensation for each plaintiff. On October 3, 1975, the court issued a final order incorporating a settlement providing for reinstatement and back-pay awards to the plaintiffs herein. In this order, the court only reserved jurisdiction to consider attorney's fees and costs.

Five days after the October 3, 1975, order terminating the litigation, petitioner first learned that the plaintiffs herein would probably not appeal the adverse class determination, and on October 17th she learned that there would definitely be no appeal. Consequently, on October 21st, she petitioned to intervene in order to file a notice of appeal with respect to the district court's final order of October 3, 1975, insofar as it reiterated striking the class action allegations from the complaint.[3]

1. Brenda Bailes Altman was added as a plaintiff on October 9, 1970.

2. The figure is derived from p. 2 of petitioner's main brief and p. 13 of the EEOC's brief and may be excessive. Defendant asserts there are only 30 in this class (defendant's main brief 50).

3. On December 27, 1972, we refused to grant leave to appeal from the district court's December 6, 1972, interlocutory order

(Continued on next page)

On October 23rd, petitioner filed a notice of appeal from the October 21st order denying her petition to intervene and also filed a notice of appeal from the October 3, 1975, order insofar as the district judge had refused to permit the cause to proceed as a class action. Because the district court erred in denying the motion to intervene and in refusing to certify a class, we reverse and remand.

Whether the petitioner should have been permitted to intervene is governed by Rule 24 of the Federal Rules of Civil Procedure. In pertinent part, Rule 24(b)(2) provides:

> "(b) *Permissive intervention.* Upon timely application anyone shall be permitted to intervene in an action:
>
> * * * * *
>
> "(2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Defendant's primary contention is that the motion to intervene was not timely. The Supreme Court has held: "Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP* v. *New York*, 413 U. S. 345, 366. Among the relevant factors are the stage of the litigation at which the intervention is sought, the interests of the intervenors, the purposes of the statute under which the suit is brought and the relative harm to the parties. *NAACP* v. *New York, supra*, 413 U. S. at 366-369; *EEOC* v. *United Air Lines, Inc.*, 515 F. 2d 946, 949 (7th Cir. 1975). Defendant argues that the motion to intervene would have been timely only if it

(Continued from preceding page)

striking the class allegations, so that an appeal first became appropriate after the district court's final order of October 3, 1975. The denial of the class allegations was not appealable earlier. *Anschul* v. *Sitmar Cruises, Inc.*, ... F. 2d ..... (7th Cir. No. 74-1908, decided May 17, 1976).

was made immediately after the court refused to certify a class. We disagree.

In our view, petitioner's application was timely within the rule because she was not advised until October 17th that the plaintiffs would not appeal from Judge Perry's final order.[4] Plaintiffs' previous attempt to appeal from Judge Perry's interlocutory order denying class status, although unsuccessful (see note 3, *supra*), indicated that they would be willing to pursue the question after final judgment. Petitioner could reasonably rely on this representation and therefore her delay in filing the motion to intervene was excusable. See *Jimenez* v. *Weinberger*, 523 F. 2d 689, 695-697 (7th Cir. 1975); *Hodgson* v. *United Mine Workers*, 473 F. 2d 118, 130 (D. C. Cir. 1972).

Our holding is consistent with the purposes of Title VII. Because the Civil Rights Act of 1964 attacks class-based discrimination, it is particularly appropriate that suits to remedy violations of the Act be brought as class actions. See *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 717, 619-720 (7th Cir. 1969). The relief sought in these suits to establish equality, not only between the group discriminated against and other groups but also among the members of the victimized group. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417-421; *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F. 2d at 719-720; *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 498 (5th Cir. 1968). The primary burden of enforcing Title VII rests with private plaintiffs. *Air Line Stewards & Stewardesses Ass'n.* v. *American Air Lines*, 455 F. 2d 101, 108 (7th Cir. 1972); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 32 (5th Cir. 1968).[5] Because of the statutory reliance on private enforce-

4. *EEOC* v. *United Air Lines, Inc., supra*, is not to the contrary, for there representation of the intervenor's interest by existing parties was adequate when intervention was sought. Intervention was sought here as soon as it was apparent that plaintiffs would not appeal the final order denying class status.

5. Because the Voting Rights Act in force at the time of the suit did not authorize a private action, *NAACP* v. *New York, supra,*

(Continued on next page)

ment, the courts have suspended the requirement that each victim of discrimination file a complaint with the EEOC once one member of the class has filed the protest. *Dodge* v. *Giant Food, Inc.*, 448 F. 2d 1333 (D. C. Cir. 1973); *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 720; *Oatis* v. *Crown Zellerbach Corp., supra.*[6] That logic also compels the conclusion here that in court, as well as before the agency, the members may rely on the champion of the class until he or she abdicates. In this case we believe that abdication occurred when plaintiffs decided not to appeal the adverse class action determination. To hold otherwise would permit one member of the class to obtain benefits greater than other members.[7] This disparity would result, not from petitioner's lack of assertiveness, but from the district court's erroneous ruling on the class action question. This result would be inconsistent with Title VII's goal to establish equality among members of the aggrieved class.

Finally, intervention would not prejudice the adjudication of the rights of the original parties, for defendant knew of the potential liability to this class since the commencement of the

(Continued from preceding page)

relied upon by defendants is distinguishable. Further, in *NAACP* there was no support for the claim that the representation of the intervenor's interests by the United States was inadequate. 413 U. S. at 368.

6. See also *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538, 551. The specific holding in *American Pipe* that the statute of limitations is tolled only during the pendency of the motion to certify a class and begins to run anew if the motion is denied is not applicable here. The statute of limitations in Title VII actions is suspended once one member of the class initiates the grievance mechanism. See *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 720.

7. The plaintiffs and the petitioner must be considered to be members of the same class. Any distinction between them such as the filing of an EEOC or state agency complaint or a grievance with the union is not signfiicant. Once a timely administrative complaint has been filed by one stewardess, all others who were discharged by operation of the rule are entitled to recover. Similiarly, the filing of a union grievance cannot be made a precondition of recovery. *Albemarle Paper Co.* v. *Moody, supra,* 422 U. S. at 414, n. 8.

class action, and until October 17th defendant could reasonably expect this liability to be enforced through an appeal of the adverse class ruling. *Jimenez* v. *Weinberger, supra,* 523 F. 2d at 701.

The other requirements of Rule 24(b)(2) have also been met. Petitioner's claim and the main action had questions of law in common, namely, the correctness of the striking of the class allegations and the remedy for the illegal no-marriage rule as applied to petitioner's class. The petition to intervene was not governed by the ten-day provision of Rule 59(e) of the Federal Rules of Procedure, for petitioner's motion did not ask the district court "to alter or amend the judgment" but was for purposes of taking an appeal from the final judgment. It is entirely proper then to permit putative class members here to intervene for the purpose of pursuing an appeal of the adverse class action determination. *Black* v. *Central Motor Lines, Inc.*, 500 F. 2d 407, 408 (4th Cir. 1974); *Smuck* v. *Hobson,* 408 F. 2d 175, 177-182 (D. C. Cir. 1969) (en banc).

Because petitioner was entitled to be an intervenor and filed a timely notice of appeal from the final order terminating the litigation, we have power to examine the adverse class ruling and accordingly deny defendant's motion to strike that notice of appeal and to dismiss that appeal.

In this case, the district court judge refused to certify the class because the putative members had failed to show an interest in reemployment either by filing a grievance with the union or a complaint with the EEOC. It is well established, however, that the filing of a charge with the EEOC is not a prerequisite to recovery as a member of an injured class where one member of the class has done so. *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 720. Nor do we believe that each member of the class can be required to exhaust other remedies before recovering. See *Albemarle Paper Co.* v. *Moody, supra,* 422 U. S. at 414, n. 8. The district court's order denying class action status must therefore be reversed.

In *Bowe* v. *Colgate-Palmolive Co., supra,* we stressed the appropriateness of a class action in a Title VII case. See also *Air Line Stewards & Stewardesses Ass'n* v. *American Airlines, Inc.*, 490 F. 2d 636, 643 (7th Cir. 1973), certiorari denied, 416 U. S. 993. On remand, the district court must comply with our ruling in *Bowe* that "relief should be made available to all who were so damaged, whether or not they filed [EEOC or comparable state agency] charges and whether or not they joined in the suit." 416 F. 2d at 721. As stated in *Oatis* v. *Crown Zellerbach Corporation,* 398 F. 2d 496, 498 (5th Cir. 1968), "It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC." As petitioner has explained in her affidavit supporting her petition to intervene, she knew that other former United Air Lines' stewardesses were challenging the no-marriage policy and therefore did not file a discrimination charge against United or a grievance under the collective bargaining agreement. We conclude that the women in petitioner's class are entitled to participate in this case under *Bowe* unless they choose to opt out under Rule 23(c)(2) of the Federal Rules of Civil Procedure.[8]

The district court's orders of October 3 and 21, 1973, are reversed with instructions to permit petitioner to intervene on her own behalf and on behalf of her class, to treat the case as an action by her class, and to fashion relief for her class.

PELL, *Circuit Judge,* dissenting. The Romasanta suit out of which the present issue arose required five years for a resolution to be reached. When that suit reached a critical point insofar as petitioner's interests were concerned more than three years ago, it in my opinion was incumbent upon her then to take immediate affirmative steps to protect her interests if she wanted to take advantage of this lawsuit as a forum for her claims.

8. This opinion does not preclude the defendant from mitigating liability or rebutting the damage claim of some members of petitioner's class. *Sprogis* v. *United Air Lines, Inc.*, 517 F. 2d 387, 392 (7th Cir. 1975).

In my opinion Judge Perry clearly acted properly when he denied the motion to intervene as untimely:

> THE COURT: Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek relief from this Court in any way during that period of time, and litigation must end. I must deny this motion. Of course, this is an appealable order itself, and if I am in error then the Court of Appeals can reverse me and we will grant a hearing, but in my judgment this is too late to come in.

Since I agree with Judge Perry and disagree with the majority finding that Judge Perry abused his discretion, I respectfully dissent.

Questions of timeliness are peculiarly appropriate for determination by the trial court, and it is for that reason that the appropriate standard for review is to determine whether there has been an abuse of discretion. The United States Supreme Court, in *NAACP* v. *New York,* 413 U. S. 345 (1973), in affirming the lower court's denial of a motion to intervene on the basis of timeliness, set forth the standard by which this Court must review Judge Perry's ruling as follows (413 U. S. at 365-66):

> Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b) that the application must be "timely." If it is untimely, intervention must be denied. Thus the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion: unless that discretion is abused, the court's ruling will not be disturbed on review. (Footnotes omitted.)

This same standard has consistently been applied in cases involving Title VII of the Civil Rights Act. *E.g., EEOC* v.

United Air Lines, Inc., 515 F. 2d 946 (7th Cir. 1975); *Black* v. *Central Motor Lines, Inc.*, 500 F. 2d 407 (4th Cir. 1974).

In *NAACP*, the Supreme Court upheld the district court's determination that the motion to intervene was untimely, even though it was filed only seventeen days after the would-be intervenors allegedly became aware of the suit, stating that "it was incumbent upon the appellants, at that stage of the proceedings, [a critical stage] to take immediate affirmative steps to protect their interests. . . ." 413 U. S. at 367.

In *EEOC, supra*, this court denied a motion to intervene as untimely in a situation much less extreme than the instant case. A pattern and practice suit was brought in April 1973, under Title VII of the Civil Rights Act, alleging discrimination against black and female employees of United Air Lines. The complaint was amended in February 1974 to include allegations of discrimination against Spanish-surnamed and Asian-American employees. When two organizations representing these latter groups attempted to intervene in July 1975, this Court affirmed the denial of intervention as untimely, even though the trial had not yet begun, because the intervenors had offered no excuse for waiting *5 months* after the complaint was amended and their interest in the action first created. See also *SEC* v. *Bloomberg*, 299 F. 2d 315 (1st Cir. 1962); *Hoots* v. *Pennsylvania*, 495 F. 2d 1095, 1097 (3d Cir. 1974), *cert. denied*, 419 U. S. 884; and *Westward Coach Manufacturing Company, Inc.* v. *Ford Motor Co.*, 388 F. 2d 627, 635 (7th Cir. 1968), *cert. denied*, 392 U. S. 927.

In a class action situation, the determination of when intervention is first appropriate relates to the question of adequacy of representation. In a true class action, it is unnecessary for an unnamed class member to intervene as long as his interests are being protected by his class representatives. In *Alleghany Corporation* v. *Kirby*, 344 F. 2d 571 (2d Cir. 1965); *cert. granted*, 381 U. S. 933, *cert. dismissed as improvidently granted*, 384 U. S. 28 (1966), where the Second Circuit denied a "last-

minute" attempt at intervention by shareholders in a derivative suit to set aside a settlement on behalf of their corporation, the court explained the connection between timeliness and adequate representation (344 F. 2d at 574):

> As we see it, the timeliness requirement, specifically articulated in Rule 24(a), is related to the question whether the shareholders' interests are or may be inadequately represented, for whether an application to intervene is prompt or tardy also turns on when the interests of the proposed intervenors were no longer properly represented.

When petitioner's application for intervention is viewed in the light of these cases, it appears clear to me that the motion was untimely. Petitioner admits knowledge of the class action denial in Romasanta in 1972 and yet offers no persuasive reason for her failure to petition to intervene then. Once the class was denied, and the suit proceeded as an individual action, she had no reason to believe her interests were being represented or protected by others. This was particularly true since the class action denial had the effect of excluding from the case all those who, like petitioner, had not protested the no-marriage rule. There was no longer anyone similarly situated to petitioner in the case.

Petitioner admits knowledge of the course of the *Sprogis* (or related) litigation from the very start (*i.e.*, September 1968, the time of her alleged discharge). Yet she made no attempt to intervene in *Sprogis* to appeal from the denial of class action in 1972 or from the final order in 1974.[1]

But instead, petitioner, with claimed knowledge of the pending lawsuits concerning the no-marriage rule, did nothing and waited seven years to identify herself as one who sought relief. Petitioner now wants to start this case all over again—three

1. Petitioner argues that she relied upon the parties in Romasanta to appeal the class action decision. But ALPA, the party responsible for bringing both the *Sprogis* and Romasanta actions, did not appeal the class denial in *Sprogis* (nor did anyone else), so there appears to be no reason for petitioner's reliance on the same parties' appealing the class decision in Romasanta.

years after Romasanta was declared not to be a class action, after many others were permitted to intervene, and after extensive negotiations in which the parties were finally able to resolve the issues in this case.

Consistent with petitioner's unhurried conduct is the fact that her motion to intervene violates the only procedural rule under which her motion can be brought, *i.e.*, Fed. R. Civ. P. 59(e). Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days afer entry of the judgment." Petitioner's motion to intervene was clearly a motion to alter or amend the judgment to add an additional party. It was served on October 17 and heard on October 21, 1975, all well beyond ten days after the entry of the final order on October 3.

It is important to note that had she sought intervention immediately after the denial of class status, and her intervention had been denied, the intervention issue would have been before this court three years ago. Furthermore, assuming that her intervention had been denied because of petitioner's failure to protest the no-marriage rule—the requirement which was the basis of the court's holding that this action lacked the requisite numerosity to proceed as a class action—then *that* issue would have been before this court and decided three years ago. Instead, petitioner chose to sit back and allow others to assume the costs and risks in prosecuting their individual actions, and now she attempts to revive her dead claim through another suit which after years of legal argument and negotiation was finally settled to the satisfaction of all parties.

When a class action is denied, former putative class members may not ignore this fact and continue on the assumption the suit is a class action ("spurious" or otherwise), as does petitioner. The denial of class status is a critical point which puts putative class members on notice that they must act to protect their rights. The tolling procedure established by the Supreme Court in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), would have no meaning without its corollary requirement that as soon as the class is decertified, former class members who want relief must "make timely motions to intervene" (414 U. S. at 553).

Finally, it should be noted that the timeliness requirements of Rule 24 have been interpreted more strictly by the courts after judgment, where absent very unusual circumstances intervention is not permitted. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 436 (C. D. Calif. 1967), *affirmed per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U. S. 580 (1968):

> The requirement of timeliness is not without foundation. The interest in expeditious administration of justice does not permit litigation interminably protracted through continuous reopening. A motion to intervene after entry of the decree should therefore be denied in other than the most unusual circumstances.

Accord, Chase Manhattan Bank v. *Corporation Hotelera de Puerto Rico*, 516 F. 2d 1047, 1050 (1st Cir. 1975) (per curiam); *Pennsylvania* v. *Rizzo*, 66 F. R. D. 598, 600 (E. D. Pa. 1975); 3B *Moore's Federal Practice* § 24.13[1] (1975 ed.); 7A Wright & Miller, *Federal Practice and Procedure*, § 1916 at 579-80 (1972).

Since, in my opinion, the timeliness issue is dispositive of this case, I have not deemed it necessary to advert to the other issues raised on this appeal.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 1, 1976.

Before
HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*

No. 75-2063

CAROLE ANDERSON ROMASANTA, et al.,
Plaintiffs,
vs.
UNITED AIRLINES, INC., a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 1157
J. Sam Perry, Judge.

ORDER

On consideration of the petition of the Appellee United Airlines, Inc. for a rehearing by the Court, and, a majority of the judges in regular active service not having voted for a rehearing en banc and a majority of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the Appellee for a rehearing be denied.

Judges Pell, Tone, Bauer and Wood voted to grant a rehearing en banc.

APPENDIX B.

PARTIES

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whethe: or not favorable

to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 24.

INTERVENTION.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As amended Dec. 27, 1946, eff. March 19, 1948.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which

intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C. § 2403.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-545

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 19, 1976
CERTIORARI GRANTED DECEMBER 6, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-545.

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

5– 8–72 Enter order, plaintiff's motion for leave to amend complaints in both cases 68 C 2311 and 70 C 1157 is hereby entered and continued to May 16, 1972 at 9:30 a.m.—Perry, J.

Mailed notices 5-10-72.

5– 8–72 Filed amendment to complaints.

5– 8–72 Filed plaintiff's motion to consolidate causes.

5–16–72 Leave is granted to plaintiff to file amended complaint. It is further ordered that both sides are to submit to the court simultaneously memorandum and proposed orders re enlargement of Sprogis case 68 C 2311, and consolidation of Sprogis case and Romasanta case on or before June 1, 1972 and cause is taken under advisement.—Perry, J.

Mailed notices 5-16-72.

5–22–72 Filed plaintiff's amendment to complaint.

6–14–72 Enter memorandum order re; denying class action in Sprogis v. United Airline case No. 68 C 2311 and denying motion to consolidate Sprogis case No. 68 C 2311, and Romasanta et al case No. 70 C 1157.(Draft)—Perry, J.

Mailed notices 6-15-72. c

6–26–72 Filed defendant's motion.

6–26–72 Enter order, defendant's motion to strike class action allegations of complaint, proceed as individual action, is entered and continued for hearing on July 28, 1972 at 2 p.m.—Perry, J.

Mailed notices 6-27-72.

6–26–72 Enter order, defendant's motion for leave withdraw first four affirmative defenses, deter all discovery until determination whether action shall proceed as class action is hereby granted. Perry, J.

Mailed notices 6-27-72.

7–28–72 Hearing on motion to strike class allegation of complaint and to proceed as individual action is held. Order said motion taken under advisement and cause is continued to September 11, 1972 at 1:30 p.m. for report on status.—Perry, J.

Mailed notices 8-1-72. ij

9–11–72 Filed Plaintiffs status report. ij

11–10–72 Filed Applicants for intervention's notice of motion; Motion to intervene as plaintiffs.

11–10–72 Enter order leave to file motion to intervene as plaintiffs, is hereby granted and leave is granted to defendant to file its response thereto.—Perry, J.

11–10–72 Filed Response of defendant to motion to intervene as plaintiffs.

11–10–72 Filed Plaintiffs objections to defendant's proposed order striking class action allegations.

11–10–72 Filed Affidavit of Daniel E. Kain.

11–10–72 Filed Affidavit of C. P. Hutchens. ij

11–10–72 Enter order Defendant's motion for leave to file affidavits of Daniel E. Kain and C. P. Hutchens is hereby granted. It is further ordered that leave is given to plaintiff to file its objections to Defendants Proposed order striking Class Action allegations.—Perry, J.

Mailed notices 11-14-72.

11–20–72 Filed Plaintiff-intervenors' reply to defendant's objections to motion to intervene as plaintiffs.

11–20–72 Filed Defendant's reply to plaintiffs' objections to the proposed order striking class action allegations.

12– 6–72 It is ordered that all allegations of the complaint relating to class action be stricken and that this

action not proceed as a class action. It is further ordered that the motion to intervene herein be granted as to Sandra Moore Ballinger, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn, Mary O'Connor Whitmore, Marlene Riehl Carney, Rita Gardino Trubshaw, Lynn Mason Raymond and Joanne Fitzgerald Hamersley. Said motion to intervene is denied as to Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala, Patricia M. Moon, Janice Schmidt Rensch, Jeanette Byers Schlau, Mary Weis, Helen Read Gunst, Diane M. Welty, Evelyn A. Ambrose and Doris Rivas Collins. (Draft)—Perry, J.

Mailed notices 12-7-72. ij

12–20–72 Filed Defendant's answer to intervenors' complaint.

12–20–72 Filed Defendant's notice to take deposition upon oral examination. ij

1 –2–73 Filed certified copy of order of USCA petition for permission to appeal is hereby denied. P

3–21–73 Filed deposition of Joanne Fitzgerald.

3–21–73 Filed deposition of Susan Wyman Fusco.

3–21–73 Filed deposition of Terry Baker Van Horn. ij

4–16–73 Filed deposition of Sarah Ann Boling. ij

4–25–73 Filed motion to intervene as plaintiff.

4–25–73 Filed Intervenor's complaint and copy.

4–25–73 Motion of Carol Paglia Barounes to intervene as plaintiff is granted and said plaintiff-intervenor is given leave to file her intervenors complaint. De-

fendant is given 20 days to answer or otherwise plead to said intervenor's complaint.—Perry, J.

Mailed notices 4-27-73. ij

5–16–73 Filed deposition of Marlene June Carney.

5–16–73 Filed deposition of Carole Elaine Brackle. ij

5–17–73 Filed Defendant's answer to complaint of intervenor Carol Barounes. ij

5–30–73 Filed deposition of Judith Hopkins Pendleton.

5–30–73 Filed depositions of Rita Ann King and Mary Whitmore. 2 volumes in one envelope. ij

7–10–73 Filed deposition of Lynn Mason Raymond. ij

11–21–73 Filed deposition of Brenda Altman and Sandra Berry Hoiles. ij

1–31–74 Filed Plaintiff's motion for summary judgment.

3 –6–74 Filed Memorandum of defendant is opposition to motion for partial summary judgment. ij

6–14–74 Enter Order dated June 13, 1974: This cause comes on upon the motion of plaintiff Rita Ann King to enter partial summary judgment in her favor by ordering that she be reinstated to her former position as a Stewardess in the employ of defendant with all rights of seniority and longevity restored. The Court has read and considered said motion and the memoranda of the respective parties and is of the opinion that said motion should be granted. Accordingly, It Is Ordered that said plaintiff Rita Ann King submit to the court within ten (10) days a proposed Judgment Order in consonance with the aforesaid opinion of the court. Similar motions for partial summary judgment filed by plaintiffs Sandra Beery Hoiles, Carole Elaine Brackle, Sarah Ann Boling and Lynn Mason Raymond are under consideration and will be the subject of a separate rul-

ing or rulings. It Is Further Ordered that this cause be and it is hereby called for June 21, 1974 at 10:00 a.m. for a trial date setting. Perry, J.

Mailed notices 6-14-74. sr

6–14–74 Enter order dated June 14, 1974: This cause comes on upon the motion of plaintiffs Sandra Beery Hoiles, Carole Elaine Brackle, Sarah Ann Boling and Lynn Mason Raymond to enter partial summary judgment in their favor by ordering that they be reinstated to their former positions as stewardesses in the employ of defendant with all rights of seniority and longevity restored. The court has read and considered said motion and the memoranda of the respective parties in support thereof and in opposition thereto and is of the opinion that said motion of the aforesaid plaintiffs should be taken under advisement with the case. Accordingly, it is ordered that said motion of the aforesaid plaintiffs be and it is hereby taken under advisement with the case. It is further ordered that this cause be and it is hereby called for June 21, 1974 at 10:00 a.m. for the setting of a trial date.—Perry, J.

Notices mailed 6-17-74. bb

6–28–74 Enter order dated June 27, 1974. Enter order granting plaintiff Rita Ann King's motion for partial summary judgment. Draft—Perry, J.

Mailed notices 6-28-74. T

6–27–74 Filed plaintiffs' motion for summary judgment.

6–28–74 Enter order dated June 27, 1974. Leave granted to certain plaintiffs to file their motion for summary judgment and defendant is given 5 days to file its response thereto.—Perry, J.

Mailed notices 6-28-74. T

7– 3–74 Enter order dated July 2, 1974. Enter decree granting motion of certain plaintiffs for summary judgment. Draft—Perry, J.

9– 5–74 Enter order dated September 4, 1974: order date of September 11, 1974 heretofore set, stricken and cause is continued to September 20, 1974—at 10 a.m. for trial date setting.—Perry, J.

Mailed notices 9-5-74. G

9–23–74 Enter order dated September 20, 1974: order cause continued to October 21, 1974 at 10 a.m. for trial date setting—Perry, J.

Notices mailed 9-23-74. T

10–22–74 Enter order dated October 21, 1974: Order cause continued to November 15, 1974 at 10:00 a.m. for trial date setting—Perry, J.

Mailed notices 10-22-74. T

11–18–74 Enter order dated November 15, 1974. Order cause continued to December 16, 1974 at 10 a.m. for trial date setting—Perry, J.

Mailed notices 11-18-74. T

12–17–74 Enter order dated December 16, 1974: order cause continued to January 14, 1975 at 10 a.m. for report on status.—Perry, J.

Mailed notices 12-17-74. T

1–16–75 Enter order dated January 14, 1975. Order cause continued to January 30, 1975 at 10 a.m. for further report on status.—Perry, J.

Mailed notices 1-16-75. T

1–31–75 Enter order dated January 30, 1975; order cause continued to February 27, 1975 at 10 a.m. for further report on status.—Perry, J.

Mailed notices 1-31-75. ij

2–28–75 Enter order dated February 27, 1975. Order cause continued to March 3, 1975 at 10 a.m. for further report on status.—Perry, J.

Mailed notices 2-28-75. T

3– 4–75 Enter order dated March 3, 1975. Order cause continued to April 1, 1975 at 10 a.m. for trial date setting.—Perry, J.

Mailed notices 3-4-75. T

4– 2–75 Enter order dated April 1, 1975: Order cause continued to May 6, 1975 at 10:00 a.m. for a report on status.—Perry, J.

Notices mailed 4-2-75. msn

5– 7–75 Enter order dated May 6, 1975: Order cause continued to June 10, 1975 at 10 a.m. for trial date setting.--Perry, J.

Mailed notices 5-7-75. G

6–11–75 Enter order dated June 10, 1975: Order cause continued to July 3, 1975 at 10 a.m. for report on status and trial date setting.—Perry, J. msn

7– 3–75 Filed motion of defendant for partial summary judgment against co-plaintiff Carole Anderson Romasanta.

7– 3–75 Filed motion of defendant to dismiss complaint as to co-plaintiff Lynn Mason Raymond.

8– 6–75 Enter order dated August 5, 1975: This cause comes on upon defendant's motion for partial summary judgment against plaintiff Carole Anderson Romasanta and defendant's motion to dimiss complaint as to plaintiff Lynn Mason Raymond. The court has read and considered said motion for partial summary judgment and the memoranda of the respective parties in support thereof and in

opposition thereto and finds that said motion is not well taken and should be denied. The court has also read and considered said motion to dismiss and the memoranda of the respective parties in support thereof and in opposition thereto and finds that said motion is well taken and should be granted. Accordingly, it is ordered that said defendant's motion for partial summary judgment against plaintiff Carole Anderson Romasanta be and it is hereby denied, and that said defendant's motion to dismiss the complaint as to plaintiff Lynn Mason Raymond be and it is hereby granted and the complaint as to her is hereby dismissed. Case called for setting at 10 a.m. 8-28-75—Perry, SJ.

Notices mailed 8-6-75. msn

8–29–75 Enter order dated 8–28–75: Order cause continued to Sept. 11, 1975 at 10 a.m. for report on status and trial date setting.—Perry, SJ.

Notices mailed 8-29-75. msn

9–12–75 Enter order dated 9-11-75: Order cause continued to Sept. 26, 1975 at 10 a.m. for further report on status.—Perry, SJ.

Notices mailed 9-12-75. msn

10– 3–75 Filed plaintiff's Notice of Motion; Motion of Plaintiff Catherine Colvin for Leave to Withdraw from this Action.

10– 6–75 Enter order dated 10-3-75: Motion of plaintiff Colvin to Withdraw granted.—Perry, SJ.

10– 6–75 Enter order dated 10–3–75: It is hereby ordered that this cause be and the same is hereby dismissed (draft).—Perry, SJ.

Notices mailed 10-6-75. msn

10–21–75 Filed Petition to Intervene for Purposes of Taking an Appeal.

10–22–75 Enter order dated 10-21-75: Petition of Liane Buix McDonald to Intervene for purposes of taking an appeal is hereby denied. Enter Order.—Perry, SJ. Notices mailed 10-22-75. msn

10–23–75 Filed Petitioner Liane Buix McDonald's Notice of Appeal from the final order and judgment of October 3, 1975.

10–23–75 Filed Petitioner Liane Buix McDonald's Notice of Appeal from the final order entered October 21, 1975.

10–24–75 Mailed copies of Notice of Appeal to Clerk USCA, plaintiff's attorney, Court Reporter and defense counsel, Mayer Brown and Plat and David J. Shipman. msn

10–28–75 Filed request to transmit complete record on appeal, including transcript of proceeding held on July 28, 1972, September 11, 1972 and October 21, 1975. msn

11–21–75 Filed certified copy USCA: The record on appeal will be filed the Clerk on or before December 2, 1975.

Court of Appeals 72-8117

12–15–72 Filed orig. and 3 copies Petition for Permission to Appeal. svc

12–26–72 Filed orig. and 3 copies Response to Petition for Permission to Appeal. svc

12–27–72 Order Judges Swygert, Pell and Sprecher *denying* petition for leave to appeal.

UNITED STATES DISTRICT COURT
Eastern Division
Northern District of Illinois

CAROLE ANDERSON ROMASANTA,
Plaintiff,

vs.

UNITED AIR LINES, INC. a corporation,
Defendant.

Civil Action
No. 70 C 1157.

COMPLAINT

The Plaintiff, by and through her attorneys, Richard F. Watt, Irving M. King, and Sheli Z. Rosenberg, complains of the Defendant and states as follows:

1. This action arises under Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e *et seq.* Jurisdiction of this Court is invoked pursuant to such Act, particularly Title VII, Section 706(f) 42 U. S. C. Sec. 2000f.

2. Plaintiff is a person of the female sex who was employed by the Defendant as a flight cabin attendant, or airline stewardess, until she was discharged from such position by the Defendant on or about May 9, 1967.

3. Plaintiff brings this as a class suit on behalf of herself and all other United Air Line Stewardesses who have been discharged on account of marriage pursuant to the policy of United Air Lines described in this Complaint. There are approximately twenty-seven or twenty-eight other such discharged stewardesses, and joinder of all of them would be impractical. There are questions of law and of fact common to all members of the class, namely, all of the stewardesses discharged by United Air Lines because of marriage; Plaintiff, as a member of the class, can fairly and properly represent and protect the interests of all members of the class. The prosecution of individual suits by individual members of the class would create a risk of inconsistent adjudications.

4. Defendant, United Air Lines, Inc., is a corporation organized and existing by virtue of the laws of the State of Delaware. Its principal office is located in Elk Grove Village, Cook County, State of Illinois, which is within the Northern District of Illinois.

5. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer, among other practices, to fail or refuse to hire any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of sex except where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

6. At all relevant times the Defendant maintained in effect a rule, regulation or policy, pertaining solely to females employed as stewardesses, requiring that stewardesses be unmarried when first employed and that they thereafter remain unmarried while so employed. The policy of Defendant, as in effect at the time of Plaintiff's discharge, calls for the discharge of any stewardess who married.

7. Defendant hires both male and female employees. There is no rule, regulation or policy of the nature described in Paragraph 6 above which is or has been maintained or enforced against male employees of the Defendant. Pursuant to the above rule or regulation Defendant has dismissed from their positions females employed as stewardesses immediately upon notification of the marriage of such employee, but no action is or has been taken against male employees upon marriage, and male employees are permitted to continue employment without regard to marital status. On or about May 9, 1967, the Defendant discharged the Plaintiff as a stewardess pursuant to the above-described policy or rule and in violation of Title VII of the Civil Rights Act of 1964, for the sole reason that she is a female and became married while in the employ of Defendant in the capacity of stewardess. Other members of the class were discharged pursuant to such policy in the period 1965-1968.

8. Defendant has committed and is now intentionally committing unlawful employment practices with respect to the Plaintiff and others in the class by discriminating against them because of their sex in summarily and arbitrarily discharging them as stewardesses because of their marriages.

9. The practices and actions of the Defendant described in Paragraphs 6, 7, and 8 above constitute unlawful employment practices in violation of Title VII, Section 2000e *et seq.* of the Civil Rights Act of 1964. As a result thereof, the Plaintiff and other members of the class have been subjected to discrimination because of their sex with respect to conditions and privileges of employment, all in violation of said statute. Plaintiff and other members of the class have been and are continuing to be wrongfully deprived of employment and substantial compensation as a direct and proximate result of the unlawful employment practices hereinabove described.

10. Plaintiff has exhausted all procedures set forth in Title VII as a prerequisite to the filing of this action. More particularly, Plaintiff filed timely charges on or about July 25, 1967, with the Equal Employment Opportunity Commission against the Defendant in accordance with the provisions of Title VII; the Commission issued its decision finding reasonable cause to believe the Defendant had committed unlawful employment practices in violation of Title VII by discrimination against her because of her sex on or about January 19, 1970, and the Commission advised Plaintiff on or about April 17, 1970, that it has failed to resolve the Defendant's unfair employment practices by conciliation.

11. Plaintiff has no other remedy at law but to bring this action.

WHEREFORE, Plaintiff prays that this Court issue an injunction restraining Defendant from discriminating against the Plaintiff and other members of the class, because of their sex in violation of Title VII of the Civil Rights Act of 1964; that the Court order the Defendant to reinstate all members of the

class in their positions as stewardesses; that the Court order the Defendant to make payment to each individual member of the class equal to all loss of compensation from the time of her illegal discharge to the date of reinstatement; that the Court order Defendant to restore to each member of the class any and all employment privileges and opportunities, including all rights of seniority or longevity of employment, which would have accrued to her had her employment not been interrupted by the unlawful discharge; that the Court order, adjudge and declare that the rule, regulation or policy of the Defendant under which Defendant discharges females from their employment as stewardesses is unlawful and unenforceable and restrain and enjoin its enforcement in the future; and that the Court order and decree such other and further relief as may be deemed just.

RICHARD F. WATT
IRVING M. KING
SHELI Z. ROSENBERG
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

ANSWER.

Now comes defendant United Air Lines, Inc., by its attorneys, and for its Answer to the Complaint states and alleges as follows:

1. Defendant admits the allegations of paragraph 1 that the action arises, and this Court has jurisdiction, under Title VII of the Civil Rights Act of 1964, but denies any implication that defendant has violated that Act.

2. Defendant admits the allegations of paragraph 2 that plaintiff is a female who was employed by defendant as a stewardess until discharged on or about May 9, 1967.

3. Defendant admits that plaintiff purports to bring this action as a class suit on behalf of herself and all other of defendant's stewardesses who allegedly were discharged on account of marriage pursuant to the policy of defendant alleged in the Complaint but denies that this is an appropriate action to be brought as a class suit. Defendant admits that approximately twenty-seven or twenty-eight stewardesses were discharged on account of marriage but states that of this number seventeen have been reinstated, two accepted an offer of reinstatement but did not return to work, one accepted an offer of reinstatement but did not want to return to flying and one resigned at the time she was offered reinstatement. Defendant denies that joinder of all such discharged stewardesses would be impractical, that common issues of fact and law are predominant, that plaintiff can fairly and properly represent the interests of all members of the alleged class and that prosecution of individual suits by individual members of the alleged class would create a risk of inconsistent adjudication.

4. Defendant admits the allegations of paragraph 3 that it is a Delaware corporation and that its principal office is in Elk

Grove Village, Cook County, Illinois, which is within the Northern District of Illinois.

5. Paragraph 5 paraphrases provisions of Title VII of the Civil Rights Act of 1964 and requires no answer.

6. Defendant admits the allegations of paragraph 6 that it maintained a rule, regulation or policy, pertaining solely to females employed as stewardesses requiring that they be unmarried when first employed and that they remain unmarried thereafter while so employed; that this policy, as in effect at the time of plaintiff's discharge, called for the discharge of any stewardess who married. Defendant denies any allegation that such policy is presently in effect.

7. Defendant admits the allegations of paragraph 7 that it hires both male and female employees; that there is no rule, regulation or policy as described in paragraph 6 of the Complaint which has been maintained or enforced against male employees; that pursuant to such policy defendant has dismissed stewardesses immediately upon notification of marriage and that no such action has been taken against male employees upon marriage, and male employees are permitted to continue employment without regard to marital status; and that on or about May 9, 1967 defendant discharged plaintiff as a stewardess pursuant to such policy. Defendant denies the allegation of paragraph 7 that the discharge of plaintiff was in violation of Title VII of the Civil Rights Act of 1964. Defendant admits that other stewardesses were discharged pursuant to such policy in the period 1965-1968, but denies any implication that these discharges were in violation of Title VII of the Civil Rights Act of 1964 or that this action can properly be maintained as a class action.

Further answering said paragraph, defendant states that such policy has never been in effect with respect to female employees other than stewardesses, and that such policy is not currently in effect with respect to stewardesses.

8. Defendant denies the allegations of paragraph 8 that it has committed and is now intentionally committing unlawful employment practices with respect to plaintiff or any other stewardess employed by defendan. and denies any implication that this action can properly be maintained as a class action.

9. Defendant denies the allegations of paragraph 9 that the practices and actions of defendant described in paragraphs 6, 7 and 8 of the Complaint constitute unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964; that as a result plaintiff, or any other stewardess employed by defendant, has been subject to discrimination in violation of the Act; and that plaintiff, or any other stewardess employed by defendant, has been and is continuing to be wrongfully deprived of employment and substantial compensation as a direct and proximate result of the alleged unlawful employment practices of defendant.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 that plaintiff has exhausted all procedures set forth in Title VII of the Civil Rights Act of 1964; that plaintiff filed timely charges with the Equal Employment Opportunity Commission; that the Commission issued its decision finding reasonable cause to believe defendant had violated Title VII; and that the Commission has advised plaintiff that it has failed to resolve the alleged unfair employment practices by conciliation.

11. The allegation of paragraph 11 that plaintiff has no other remedy at law but to bring this action is conclusory and requires no answer.

First Affirmative Defense

1. Defendant's action in continuing the long-standing policy of requiring the termination of stewardesses' employment upon marriage and its further action in applying said policy to plaintiff was taken in good faith, in conformity with, and in reliance on a written interpretation or opinion of the Equal Employ-

ment Opportunity Commission, and that by reason of said good faith reliance defendant is relieved of any and all liability or punishment for the alleged unlawful employment practice herein complained of, by reason of Section 713(b) of the Civil Rights Act of 1964 (78 Stat. 265, 42 U. S. C. § 2000e-12).

Second Affirmative Defense

1. Defendant's long-standing policy of requiring the termination of stewardesses' employment upon marriage was not unlawful and in violation of Section 703(a) of the Civil Rights Act of 1964 (78 Stat. 265, 42 U. S. C. § 2000e-2).

Third Affirmative Defense

1. In the alternative, even if defendant's long-standing policy of requiring the termination of stewardesses' employment upon marriage would otherwise be in violation of Section 703(a) of the Civil Rights Act of 1964 (78 Stat. 265, 42 U. S. C. § 2000e-2), such policy is not an unlawful employment practice by reason of Section 703(e) of the Civil Rights Act of 1964 (78 Stat. 265, 42 U. S. C. § 2000e-2) because sex or marital status, or both, are bona fide occupational qualifications reasonably necessary to the normal operation of the position of a stewardess.

Fourth Affirmative Defense

1. In the alternative, even if defendant's long-standing policy of requiring the termination of stewardesses' employment upon marriage is in violation of Section 703(a) of the Civil Practice Act of 1964 (78 Stat. 265, 42 U. S. C. § 2000e-2), plaintiff is not entitled to any relief by reason of Section 706(g) of the Civil Rights Act of 1964 (78 Stat. 265, 42 U. S. C. § 2000e-5) because defendant has not intentionally engaged in and is not now intentionally engaging in such unlawful employment practice.

Fifth Affirmative Defense

1. On or about November 7, 1968, defendant concluded a Letter of Agreement with the Air Line Pilots Association, the bargaining representative for the stewardesses, by which it agreed that marriage would no longer disqualify a stewardess from continuing in its employ and that all stewardesses who had been terminated because of marriage and had filed a valid grievance under the collective bargaining agreement or a valid complaint before the Equal Employment Opportunity Commission or any state agency would be offered reinstatement. It was agreed that acceptance by a stewardess of reinstatement would be in full satisfaction of any grievance or complaint filed by such stewardess. A copy of the Letter of Agreement is attached hereto as Exhibit A and made a part hereof.

2. Pursuant to that Agreement, defendant sent a letter dated November 14, 1968 to plaintiff offering her reemployment. A copy of such letter is attached hereto as Exhibit B and made a part hereof.

3. Plaintiff accepted the offer contained in defendant's letter dated November 14, 1968 and withdrew her charge before the Equal Employment Opportunity Commission. Copies of plaintiff's letter accepting defendant's offer of reinstatement and plaintiff's letter, dated November 28, 1968, to the Equal Employment Opportunity Commission are attached hereto as Exhibits C and D and made a part hereof.

4. Plaintiff agreed to reinstatement as a stewardess in lieu of any and all other relief for the alleged unlawful employment practice of defendant and is, therefore, barred from maintaining this action.

WHEREFORE, defendant prays that the Complaint be dismissed and it be awarded its costs.

UNITED AIR LINES, INC.
By STUART BERNSTEIN
ARTHUR J. KOWITT
JAMES W. GLADDEN, JR.
Its Attorneys

EXHIBIT A

Letter of Agreement
between
United Air Lines, Inc.
and
The Stewardesses and Flight Stewards
in the service of
United Air Lines, Inc.
as represented by
The Air Line Pilots Association,
International

This Letter of Agreement is made and entered into in accordance with the provisions of Title II of the Railway Labor Act, as amended, by and between United Air Lines, Inc. (hereinafter referred to as the "Company") and the Stewardesses and Flight Stewards in the service of United Air Lines, Inc., as represented by the Air Line Pilots Association, International (hereinafter referred to as the "Association").

Witnesseth:

The Company agrees that marriage will not disqualify a Stewardess from continuing in the employ of the Company as a Stewardess, but any Stewardess who shall hereafter become pregnant shall have her services with the Company permanently severed as a Stewardess and she shall at that time forfeit her seniority and any recourse to Section XII, Investigation and Discipline, of the Agreement between the parties dated September 27, 1967.

All Stewardesses who have been terminated by the Company because of marriage and have filed a valid grievance protesting such policy, or who have as of this date filed a valid complaint before the Equal Employment Opportunity Commission or

State Agencies, will be offered the opportunity to return to active Stewardess service. Such Stewardess shall make application for reinstatement with no loss of seniority to the Director of Stewardess Service within thirty (30) days of receipt of such notification from the Company of such offer.

Acceptance of reinstatement will be in full satisfaction of any grievance or complaint filed by such Stewardesses. The Association will encourage such Stewardesses to accept reinstatement as provided above.

This Agreement shall become effective as of the date of the signing hereof and shall continue in full force and effect concurrently with the Agreement dated September 27, 1967 between United Air Lines, Inc. and the Stewardesses in the service of United Air Lines, Inc. as represented by the Air Line Pilots Association, International.

In Witness Whereof, the parties hereto have signed this Letter of Agreement this 7th day of November, 1968.

Witness:
/s/ PERRY A. WOOD
/s/ JACK D. KANASH
/s /O. E. WILKINSON
/s/ ROBERT WERTHEIMER

For United Air Lines, Inc.
/s/ CHARLES M. MASON
Charles M. Mason
Senior Vice President—Personnel

Witness:
/s/ BEATRICE L. KAUFFMAN
/s/ V. DIANE ROBERTSON
/s/ MARTY BROWN
/s/ BETTY JO STEWART
/s/ JOHN G. LOOMOS

For the stewardesses and stewards in the Service of United Air Lines, Inc.
/s/ CHARLES H. RUBY,
Charles H. Ruby,
President—Air Line Pilots Association, International
/s/ MARGIE COOPER
Margie Cooper
Vice President—Steward and Stewardess Division

UNITED STATES DISTRICT COURT

* * (Title Omitted in Printing) * *

NOTICE OF MOTION

To: Mr. Stuart Bernstein
Mr. Arthur Kowitt
Mayer, Brown & Platt
231 South LaSalle Street—Suite 1955
Chicago, Illinois
Attorneys for Defendant

Please take notice that on October 4, 1971, at the time and place set by the Honorable J. Sam Perry for a status report in this cause, we shall ask the Court to set this cause on an early date for a pre-trial conference, or such other type of hearing as the Court may direct, for the purpose of determining or defining the scope of the class of plaintiffs represented in this action.

/s/ IRVING M. KING
Attorneys for Plaintiff.

I certify a copy of this notice was mailed to the above addressees this 28th day of September, 1971.

/s/ IRVING M. KING
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

MARY BURKE SPROGIS,
Plaintiff,

vs.

UNITED AIR LINES, INC.,
a corporation,
Defendant.

Civil Action
No. 68 C 2311

CAROLE ANDERSON ROMASANTA and BRENDA BAILES ALTMAN, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

UNITED AIR LINES, INC.,
a corporation,
Defendant.

Civil Action
No. 70 C 1157

MOTION OF PLAINTIFFS
TO CONSOLIDATE CAUSES

The plaintiffs in each of the above cases, by their attorneys, move the Court, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, to consolidate the above two actions for the purpose of further proceedings. In support of this motion the plaintiffs state the following:

1. Each of the plaintiffs in the above cases is a former stewardess discharged by defendant United Air Lines, Inc. because of marriage.

2. Each complaint contends that the defendant's rule prohibiting marriage of stewardesses and the discharge of women

as stewardesses upon their marriage violated Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000e, *et seq.*, and in the *Sprogis* case the Court has so found. The Court of Appeals has affirmed this Court's finding.

3. All of the plaintiffs in both of the above cases are represented by the same attorneys in this Court.

4. The sole defendant in both of the cases is United Air Lines, Inc. and it is represented by the same attorneys in each case.

5. The complaints in the two cases allege, and the defendant's answer in each admits, that the defendant maintained a firm rule or policy against marriage which it enforced against women employed as stewardesses throughout the defendant's system. Under this rule, no stewardess who became married was permitted to continue in the defendant's employ in the stewardess capacity. The Court has found that this rule was one of general application and that its implementation constituted a violation of Title VII.

6. The employment as a stewardess of each of the named plaintiffs and all those that they represent in the above cases was terminated as a direct result of the maintenance and enforcement of the defendant's unlawful rule, and there are, therefore, common questions of law and fact involved in these actions.

7. In the *Sprogis* case, the Court has granted judgment for the plaintiff and now has before it the issue of whether similar relief should be granted to other stewardesses similarly situated. The *Romasanta* case, since it does involve similar issues of law and fact, has been placed on a passed case or dormant calendar, pending the defendant's unsuccessful appeal of the decision in the *Sprogis* case. The complaint in the *Romasanta* case is filed as a class action and it therefore, like the *Sprogis* case now does, involves not only the common question of the validity of the defendant's rule but the shared issue of whether relief should

be granted to the stewardess-victims of the defendant's unlawful rule as a class.

8. Consolidation of these causes would tend to avoid unnecessary costs and delays and would permit the Court to dispose most expeditiously of all issues between United Air Lines, Inc., and the group of stewardesses whose employment in such capacity it terminated as a result of its unlawful policy.

9. The plaintiffs believe that no prejudice to any party could result from an order consolidating the causes at this time.

RICHARD F. WATT
IRVING KING
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

MARY BURKE SPROGIS,
Plaintiff,
vs.
UNITED AIR LINES, INC.,
a corporation,
Defendant.

Civil Action
No. 68 C 2311

CAROLE ANDERSON ROMASANTA and BRENDA BAILES ALTMAN, on behalf of themselves and all others similarly situated,
Plaintiffs,
vs.
UNITED AIR LINES, INC.,
a corporation,
Defendant.

Civil Action
No. 70 C 1157

MEMORANDUM AND ORDER

The court has before it the issue of whether class relief is appropriate in the case of *Mary Burke Sprogis* v. *United Air Lines, Inc.* and a motion to consolidate the *Sprogis* case with that of *Carole Anderson Romasanta, et al.* v. *United Air Lines, Inc.*

In its original decree in *Sprogis*, this court found that the enforcement of the no-marriage policy of United Air Lines ("United") discriminated against plaintiff Mary Burke Sprogis because of her sex in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964. The court enjoined United from discriminating against plaintiff, ordered the air line to restore her to her employment and retained jurisdiction of the cause to determine plaintiff's loss of earnings. Plaintiff was directed to submit suggestions as to whether the scope of the relief should be extended to other stewardesses discharged by defendant's enforcement of its no-marriage rule. At this point further proceedings were stayed while an interlocutory appeal was taken.

The United States Court of Appeals affirmed in Sprogis and the cause was returned for further proceedings on "determination of the propriety of class relief." In its majority opinion the Court of Appeals said the district court had jurisdiction to provide relief to individuals similarly situated where "justice requires such action" and that "in our opinion, Rule 23 to the contrary notwithstanding, the district court possesses such power in Title VII cases." However, the majority in affirming this court's power to extend relief expressed no opinion on the ultimate decision to be reached on remand and said:

> ". . . Whether such relief is appropriate in this case must first be determined by the court below after consideration of the arguments advanced by the parties, including references to the safeguards of Rule 23. We merely hold today that the court may so proceed."

The court has considered the memoranda of the parties and the argument of counsel on the propriety of class relief and, if

extended, the scope of the class entitled to relief, together with the motion to consolidate. It has considered whether justice requires the conversion of the *Sprogis* case into a class action in light of the important safeguards of Rule 23. *Sprogis* was initiated by a single plaintiff. It involves back pay. Others now seek to benefit only after judgment.

Rule 23(c)(1) provides:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

As Circuit Judge Stevens put it in his dissenting opinion,

> "At a minimum, this rule requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or back pay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair."

Mrs. Sprogis filed her complaint in this court in November of 1968. The court granted her motion for summary judgment in November 1969 and entered its findings, conclusions and decree in January 1970. It asked plaintiff to submit, in the form of suggestions to the court, any matters which plaintiff considered pertinent to a consideration of the issue of whether the scope of relief given Mrs. Sprogis should be made applicable to other stewardesses discharged by defendant pursuant to United's said no-marriage policy determined to be in violation of Title VII. On March 11, 1970 defendant filed its notice of appeal. Approximately two months later Carole Anderson Romasanta filed her complaint and on October 9, 1970 she was joined by Brenda Bailes Altman in an amended complaint filed on their own behalf and on behalf of all others similarly situated.

Prior to the bringing of these actions, United had revoked its policy and offered to reinstate all stewardesses whose employment was terminated under the policy and who had filed a protest against termination. Members of the proposed class therefore seek monetary relief. Those eligible could not have been unaware of their rights as many of them pursued their remedies before administrative bodies or in other federal courts prior to the time *Sprogis* was commenced and after defendant discontinued its no-marriage policy. It appears to the court that some accepted early offers of reinstatement or abandoned their claims and that the claims of some are barred by statutory limitations. Those eligible did not see fit to join in the *Sprogis* case. After it appeared Mrs. Sprogis was to have relief, the *Romasanta, et al.* action was brought here and other stewardesses now seek to benefit after the decision on the merits by moving for consolidation of Romasanta and extension of relief to all.

The Romasanta case is pleaded as a class action. There is no question that the relief on the discrimination question granted in *Sprogis*, if found applicable, can be extended to other stewardesses. However, *Sprogis* was decided on its merits and the other stewardesses must present their cases. It would be unjust to defendant to allow one-way intervention in *Sprogis*, for if class relief were extended, it is probable no class member would decline to join in a chance for monetary reward now that the discrimination issued has been determined.

A denial of the motion to convert *Sprogis* to a class action and denial of the motion to consolidate will necessitate a separate trial of *Romasanta*. But this court is of the opinion it cannot disregard the safeguards of Rule 23.

The court is now convinced that *Sprogis* cannot be converted to a class action. The issues in *Sprogis* have been decided without considering the claims of other members of a purported class. Furthermore, the court has considered the other requirements of Rule 23 and is not convinced that conversion would be justified. Having considered the composition of a possible

class on the basis of the parties' memoranda, it may well be that the class would fail for lack of numerosity. The major question of law or fact common to the class has already been decided, that of discrimination because of sex. It appears that there are no longer any common questions of law or fact, or predominating questions as required by Rule 23. Facts and circumstances would vary from individual to individual as would the damages. Defendant air line has the right to raise other defenses, as it appears it will, in *Romasanta* and these would have to be separately determined. This court cannot see that by joining the two cases it would arrive at some set formula or "a method superior to other fair and available methods for the fair and efficient adjudication of the controversy" (Rule 23(b)(3)).

A preliminary consideration of the facts and law in this matter might indicate there should be a consolidation of *Sprogis* and *Romasanta* to do equity to all parties. However, upon a careful consideration of all the facts, law and circumstances, this court is of a contrary view. The safeguards of Rule 23 must prevail here. "Justice" does not require the converting of *Sprogis* into a class action.

It is, therefore, Ordered that cause No. 68 C 2311, *Mary Burke Sprogis* v. *United Air Lines, Inc.* continue as an individual action. The court hereby appoints David J. Shipman as a Special Master to take testimony and to submit, within 60 days, for this court's consideration a recommendation as to a monetary award due Mary Burke Sprogis and in accordance otherwise with the decree of the court on January 21, 1970 and subject to the provisions of Title VII of the Civil Rights Act of 1964.

The court not having broadened the relief in *Sprogis*, the motion to consolidate that cause with No. 70 C 1157, *Romasanta, et al.* v. *United Air Lines, Inc.*, is denied. It is so ordered. The views of the court set forth herein are in no way prejudicial to the eventual disposition of the *Romasanta* case on its merits.

ENTER:

/s/ J. S. PERRY

Judge

Dated: Chicago, Illinois, June 14, 1972.

IN THE UNITED STATES DISTRICT COURT
* * (Title Omitted in Printing) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable J. Sam Perry, Senior Judge of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, July 28, 1972, at the hour of two o'clock p.m.
Present:

Messrs. Cotton, Watt, Jones, King & Bowlus (104 West Adams Street, Chicago, Illinois 60603), by Mr. Richard F. Watt and Ms. Peggy Hillman, appeared for plaintiffs;

Messrs. Mayer, Brown & Platt (Suite 1955, 231 South LaSalle Street, Chicago, Illinois 60604), by Mr. Stuart Bernstein, appeared for defendant.

* * * * *

[3] [Mr. Bernstein:]

In summary, our position here is that the issues presented in Sprogis concerning the propriety of converting Sprogis into a class action are equally applicable to Romasanta, despite the fact that Romasanta was filed initially as a class action. The reasons we assert that are that in Romasanta, being filed after judgment in Sprogis, the same infirmities which we pointed out to your Honor in Sprogis are here present.

What I propose to do, your Honor, is to go through the requirements of Rule 23 and demonstrate to you how the same factors which motivated your Honor and upon which your Honor relied in his memorandum in Sprogis are equally present here.

One initial perhaps procedural matter, Sprogis was heard by your Honor on a motion to determine whether class action is appropriate in Sprogis and also on a motion to consolidate Romasanta and Sprogis.

Memoranda were filed in that proceeding, briefs were filed by both sides, and I submit that at this time your Honor has before him the memoranda on this issue of class action, the memoranda [4] that were filed by both parties in Sprogis. So that I think reliance on those memoranda is proper.

The Court: You wish to adopt them as part of your argumen

Mr. Bernstein: I would suggest that so that we have at this point the briefs before you that were filed there. In fact, two of them have the joint caption of Sprogis and Romasanta. You may recall that we argued in chambers, Mr. King and I did, the two motions, the motion to consolidate and the motion as to whether or not to proceed with Sprogis as a class action.

I think in the course of this, we then could rely on some of the matters asserted in those briefs, and your Honor may recall that in one of those briefs, it was effectively an affidavit because we had attached thereto an affidavit of an United official attesting to the validity of the facts that were asserted in the memorandum. I don't know whether they will become relevant in the course of my argument, but if I should refer to them, that is the basis upon which I will allege that.

Preliminarily, your Honor, I would

* * * * *

[6] the effect? Part of your argument is the fact that you filed a suit in a labor class action doesn't mean that it automatically becomes a class action. You must qualify under Rule 23.

Mr. Bernstein: That's correct.

The Court: I don't think there is any dispute about it.

Mr. Bernstein: Rule 23(a) sets out the prerequisite and Rule 23(b) what must be found to maintain a class action and 23(c) provides that there be a determination by the Court of the propriety of the class action. It is not an automatic matter at all.

First, the identity of the two cases. In the briefs filed by plaintiffs in the Sprogis case in which they urged consolidation of Sprogis and Romasanta, they alleged that these were the same suits, that the gravamen of the two suits is identical. I think that is fairly clear. They both attacked the policy of United Air Lines regarding the requirement that stewardesses should be unmarried, the policy which your Honor found in the memorandum in Sprogis had been abandoned even prior to the institution of the Sprogis case. The policy . . .

* * * * *

[17] [Mr. Bernstein:] Certainly those individuals' status ought not to be disturbed and they will not be appropriate in any class action.

If all of these were to be brought before the Court for the sole purpose of determining what damages, if any, they would be entitled to or what special defenses we would have, your Honor, we would simply have a series of individual cases which would go on for some indefinite period of time, depending on the ultimate scope of the class. No injustice is worked by not permitting this to proceed as a class action. Anybody that has a claim that is still viable can proceed with the claim. Those who have settled the case are back at work. Nobody has come forward in this case, except Mrs. Romasanta and Mrs. Altman, since Sprogis was filed.

Your Honor pointed out that nobody attempted to intervene in the Sprogis case. Nobody else has attempted to intervene in the Altman case, and that has been around since 1970. I submit that this matter ought to be put to rest and we ought to proceed to dispose of the claims of Mrs. Romasanta and Mrs. Altman as we are doing now with Mrs. Sprogis and be done with this matter.

* * * * *

[29] or state agency. Some of them did not.

The Court: You have more than one question, then.

Mr. Watt: No, I think that question, as far as whether or not all of them went to the EEOC, has been determined, your

Honor, insofar as the class is concerned, provided the class representatives went through the necessary procedure and got their suit letter, so that they were justified in bringing proceedings under Title VII of the 1964 Act. It is not necessary that all of the members of the class have done the same thing, as long as the representatives have done it. I think that issue has been decided.

Whether or not they went to the Union and filed grievances is entirely irrelevant as to whether they are part of the same class or not.

The Court: Isn't there a difference in the class between those who tendered resignations and those who didn't?

Mr. Watt: We are not raising that issue in this argument at this time, your Honor. We discussed that with you in connection with the [30] Sprogis case. I don't think that is a part of Mr. Bernstein's argument, and there is nothing before your Honor with respect to that now. It may be, after a fuller record, that your Honor would determine that only those who received an actual letter saying, "You are discharged because of your marriage," should be includable and not those who resigned under protest because they recognized if they didn't resign, they would be fired.

We are not really going into that.

The Court: You don't seek to make two classes?

Mr. Watt: No, we do not. We believe there is essentially one class here.

The Court: You think that is just a matter of fact?

Mr. Watt: I think that is a factual question.

Now Mr. Bernstein says that some of them accepted reinstatement; some of them did not. Some of them accepted the first offer of reinstatement and some of them accepted the second offer of reinstatement. I don't think that changes it—

* * * * *

[33] Mr. Watt: You may, you may, and I submit that that is something which we will have to go into at the point when we have developed the facts. We just don't have them.

I think, so far as those questions, as to the representative nature of these two plaintiffs, and who was in the class and so on, we simply have to have a fuller record.

The real argument I am directing my attention to is Mr. Bernstein's notion that with the Sprogis decision, he can completely defeat any subsequent class suit. I must say that baffles me completely, because by winning the Sprogis case, the rest of the stewardesses were wiped out of the court unless each and every one of them came into court separately.

The Court: With respect to everything I said in the Sprogis case, the heart of my decision was that here is one person who has come in and won a suit individually and that it could not then be readjudicated as a class action. That was my viewpoint there.

[34] Mr. Watt: I understand that.

The Court: I don't contend that a class action couldn't be maintained by other persons. It is my theory that if it is going to be a class action, let it be a class action in the beginning, so that the Court can have the full advice of all counsel and full defense. Certainly a defendant might make one defense and spend X dollars in defending an individual action; whereas, if it were made a class action, they might spend a great deal more time of investigation and legal talent and what not if it is a class action.

That was the heart of my theory.

Mr. Watt: I understand. If it did not begin as a class action, then it would be inequitable to the defendant to have it converted to a class action after judgment. I understand that, your Honor, and I think that is a perfectly defensible and proper position, as your Honor viewed it.

The Court: Let me hear from Mr. Bernstein first.

Mr. Watt: But I don't see how it applies to Mrs. Romasanta.

* * * * *

[41] The Court: Gentlemen, I would not like to try a guinea pig case. I have never been very great on trying guinea pig cases. I have in some instances done it when I couldn't help it, but I think my way of handling this is to take motion under advisement. I am still of the opinion that it would be better if we had all of these individuals in here and forget about the question of a class action and get these, since you are able to know them.

I would like to take it under advisement, allow you to do some discovery, and then come back and see who you find, how many you find, that are eligible in this class.

Now, I have continued this case and I would like to move it. I will give priority to it, but I would like, I think, to approach it and not make a decision on this today, not that I am hesitant about making a decision.

Mr. Watt: I understand.

The Court: Because if I deny the motion to- [42] day, it would be an appealable matter sooner or later, and we would have maybe ultimately a guinea pig case in this situation, after the Court of Appeals and back. I would like to terminate this bit of litigation.

Mr. Watt: I agree.

The Court: I believe the way to do it is to allow you some discovery on this question, and I will tell you quite frankly, I would be favorable toward, when you come in with your discovery, naming these individuals and see if we can't avoid the class action.

Mr. Watt: Let me ask a question, your Honor. I have no objection to it, but what I anticipate—

The Court: When I get through with it, it may be that I would have to oppose the class action.

Mr. Watt: What I anticipate is this: Supposing we should say, "Your Honor, you are absolutely correct; Mr. Bernstein is correct. We can't proceed with a class action. We will come in with individual plaintiffs."

We start adding individual plaintiffs [43] and Mr. Bernstein will assert the statute of limitations with regard to each and every one of them. There isn't any question that is what he has in mind.

Mr. Bernstein: Why not, your Honor?

Mr. Watt: That is exactly my point.

The Court: Wouldn't that apply if you had a class action?

Mr. Watt: It would not, your Honor. If these people are representative of a class and they adequately protect the interests of the class and we meet the other requirements of Rule 23, then all the members of the class so determined are entitled to benefits in a determination ultimately reached in any judgment. Because you could have a class of 10,000 people, some of whom, as of the time the lawsuit is filed and even as of the time the judgment is reached, never heard of the case.

The Court: Your statute of limitations would be raised on accounting ultimately, anyway.

Mr. Watt: The statute of limitations or the amount that anybody was entitled to recover would be determined ultimately after judgment, but [44] if a person is properly a member of the class, the statute of limitations doesn't run against him if he is in the class.

The Court: We will go into that. I am going to give you an opportunity to get some discovery on this.

Mr. Bernstein: Your Honor, may I ask a question on this, because this becomes quite critical. Discovery somehow ought to be limited to certain classes of girls, otherwise we have an absolutely impossible task before us.

The Court: It is classified by the complaint, isn't it?

Mr. Bernstein: The class in the complaint is really quite broad, your Honor. We had opposed a similar allegation in Sprogis when we were considering the alternative of what should be Class B. For example, your Honor, we have argued before you that there were a number of the girls, with respect to whom plaintiff alleges are class, who have accepted offers of settlement made prior to the institution of any litigation.

I cited to you the decision that your Honor rendered in the American Air Lines' [45] pregnancy case, in which a settlement was upheld after the suit was filed, based on reinstatement only, and which was affirmed by the Court of Appeals. Is that to be opened up again? Is that to be opened up again?

I think we have to have some direction here before we talk about discovery.

Mr. Watt: We served on Mr. Bernstein—

The Court: The fact that it is discoverable does not make it an admission in evidence.

Mr. Watt: Of course not.

Mr. Bernstein: It is simply the burden it imposes upon us, your Honor, in terms of discovery.

The Court: It should not be too big a burden. The names of the persons who were discharged under those circumstances during that period of time, and we will worry about the classification of it. I have well in mind what you have to say. I know there are a lot of limitations.

Mr. Watt: We served on Mr. Bernstein, some time in June —and my copy does not indicate the date—a notice to take the depositions of three supervisory persons at United Air Lines, [46] who according to our information were most likely to have knowledge with respect to the relationship to United Air Lines and these stewardesses during the period of time involved.

The Court: I will tell you what I would like to do. The first day I am back here, in order to expedite it, I would like

to set this forward for a status call on that day, not trying to cut off anything. I would like to hear you at 1:30 on Monday, the 11th of September. We will call it for a status call and let you proceed with discovery and take some depositions.

At that time you will be prepared to talk about the classes and we can sit down and set a cut-off date for final discovery, if further discovery is needed, and also define the class, so that there would be a limitation.

I see what your point is. We don't want to go on endlessly.

Mr. Watt: We don't want to, either.

The Court: Nothing will be binding this day. I will simply let you go ahead and take some depositions, a reasonable number of depositions, and be prepared, both of you, to state your positions [47] on that day as to the classifications. Because we are not going to open this up for all the world.

Mr. Bernstein: May I ask Mr. Watt if the notice that he served on us on June 22 is the basis upon which he is going to proceed with discovery, the names you have listed in this document?

Mr. Watt: On the basis of what we now know, that is what we intend to do, yes, sir.

Mr. Bernstein: Your Honor, let me point out the problems which I have been trying to assert all afternoon. Among the names on this list are the names of Marilyn Lansdale and Kathryn Meirmuntz. Both of these young ladies have been involved in litigation which has proceeded to final judgment. Are they to be brought in again, or is discovery to be allowed with respect to this?

The Court: We will know after we hear the final litigation on that.

Mr. Watt: Clearly, your Honor, if United Air Lines has—

The Court: That will have to be determined. It may be that their litigation is over and res adjudicata.

[48] Mr. Bernstein: It is a matter of record, your Honor, Lansdale was determined by the Court of Appeals for the Fifth Circuit.

Mr. Watt: One document will establish that, your Honor, and that is a copy of the judgment.

Mr. Bernstein: Mr. Watt, you know that. You know what has happened in Lansdale. Why do you even include this name? You know what happened with Meirmuntz. I don't understand this.

The Court: I don't want to waste any time on it, I assure you that, and I don't want to pass judgment, but it would seem to me that somebody who had a final judgment would be res adjudicata.

Mr. Watt: We are not going to burden United Air Lines with needless discovery.

Mr. Bernstein: It is nice to have some assurance of that, your Honor, but I would feel a little better about it if I had the assurances of the Court.

The Court: Indicate to him some of them so there would be no dispute about it before some emergency judge who won't know a thing about it.

Mr. Watt: Your Honor, we have no intention, [49] it is not to our interests, to go into a lot of extraneous matters. As I have indicated, and Mr. King has indicated on numerous occasions, there are many facts which simply we do not have and United Air Lines does.

Let's get the facts with regard to whatever total number of stewardesses are involved by reason of their having been terminated, and let's come back before your Honor.

The Court: That is the reason I am fixing it for a status call. I don't want to try to have a hard and fast rule here, and I don't want you to, so to speak, harass them; but yet, I do think that you are entitled to have the names made available to you of some of these people.

Now after you have the names and you have discussed it with your clients and some of them, you would be able to set up the kind of classification that you wish, and counsel will be able to object to it and set up the kind that he believes should be made here, if it is a class action.

On the other hand, when you get through with this, you may find out that you [50] know enough that we may have the individuals before us, and then we would avoid any controversy over class actions.

Mr. Watt: Very good.

The Court: The important thing is if we could get the individuals here, then we would have a question of fact only and we wouldn't have a possible guinea pig lawsuit over a class action to go back up to the Court of Appeals, because who knows how the ball bounces when it gets up there? Depends on the three in the panel that is chosen.

I would like to have it resolved on a factual basis as to each individual, if at all possible.

Mr. Bernstein: I take it, your Honor, then, our motion to strike has been taken under advisement?

The Court: It is just continued generally. It is taken under advisement.

Mr. Watt: Very good. Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

IN THE UNITED STATES DISTRICT COURT
• • (Title Omitted in Printing) • •

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable J. Sam Perry, Senior Judge of said Court, in his courtroom in the United States Court House, Chicago, Illinois, on Monday, September 11, 1972, at the hour of 1:30 o'clock p.m.

Present:

Messrs. Cotton, Watt, Jones, King & Bowlus (104 West Adams Street, Chicago, Illinois 60603), by Mr. Richard F. Watt and Ms. Peggy Hillman, appeared for plaintiffs;

Messrs. Mayer, Brown & Platt (Suite 1955, 231 South La Salle Street, Chicago, Illinois 60604), by Mr. Stuart Bernstein and Mr. James Gladden, appeared for defendant.

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[23] duration. It is not of indefinite duration. He is attempting to resuscitate a right which these girls let lapse by sitting back, resting on their rights. The statute of limitations always means that. There is a limited period in which a complaint can be made. That period has long since passed, and what counsel is attempting to do is to revive that right. It is not a matter of contract rights. We are talking about statutory rights, rights of every kind. Your Honor has the authority to determine what is an appropriate class in this action, and I am suggesting to you, apart from other arguments that we have raised at earlier stages of this, that the class should fail for lack of numerosity because the class ought to be limited to those who have indicated in a timely manner some protest against the action taken by the company. They cannot sit back for six years or for four years and then come in here and say that they want to be part of this class. It is grossly unfair and contrary to the Rule.

The Court: Gentlemen, I have thought a good deal this summer of this problem, and I am of the opinion that I must grant this motion to [24] strike the class limitation and limit the class to those who have made a protest. Over this great length of time, you have the statute of limitations, and I feel I must grant the defendant's motion in this matter. I want to say at this time that any individual who comes within this classification who wishes to come in will be admitted.

Mr. Bernstein: Your Honor, may I ask one clarification. As I have represented to you, a number of those in that group who protested have had their claims settled by other tribunals and some have settled the matter.

The Court: Well, those who have settled, that is it. We are limited to those people who have not settled and disposed of their claims. If there are such other persons whose claims have not been settled, I would be glad to admit them as co-plaintiffs.

Mr. Bernstein: Would they come in, your Honor, on the joinder theory, because we have, as I represented, no more than ten.

The Court: They come in under the joinder theory.

Mr. Bernstein: On joinder?

[25] The Court: Yes. I think that is a proper disposition, Mr. Bernstein. Prepare an appropriate order on that basis.

I want to make it clear that any individual, as I have indicated, can come in.

Mr. Bernstein: Who has protested and not otherwise settled.

The Court: Yes.

Mr. Bernstein: All right, sir.

Mr. Watt: Let me just raise one question with respect to that, because I think if Mr. Bernstein prepares the order we may wish to file something in response to the order to protect our position.

The Court: I will continue it for a final order until he presents it so I can hear you if you have something else.

Mr. Watt: Yes. I think that is what we will want to do, your Honor, and I just raise this now, I think we will want to say to your Honor that this is a controlling question with respect to which we should have an opportunity of having the matter heard on appeal at this point, because if there is a class which encompasses more than the very limited number who are going to come in individually—

[26] The Court: Counsel, suppose you prepare an order in accordance with what you think it ought to be, and let him prepare it in accordance with what his viewpoint of it is. Include what you think ought to be added, and let's set a time for you to come in on it.

Mr. Watt: Then may I ask one further question, your Honor. May we, within the limitations that your Honor has set, may we as counsel for the individual plaintiffs be authorized to communicate?

The Court: To communicate? By all means. There is no question about it.

Mr. Watt: May we have an understanding from Mr. Bernstein that other than the three who he has mentioned that are before the New York tribunal, that no further settlements will be made with respect to these individuals unless we at least have some notice of it?

The Court: Of these seven you are talking about?

Mr. Watt: He comes up with seven. I do not understand his arithmetic, to be honest with you.

The Court: With the understanding that except as to those three he has already mentioned, they . . .

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IN THE UNITED STATES DISTRICT COURT

* * (Title Omitted in Printing) * *

MOTION TO INTERVENE AS PLAINTIFFS.

Evelyn A. Ambrose, Elizabeth Glenn Ashworth, Sandra Moore Ballinger, Sarah A. Boling, Mary Weis, Carol Elaine Brackle, Marlene Riehl Carney, Doris Rivas Collins, Catherine Reese Colvin, Bernadette Dixon, Susan Fusco, Helen Read Gunst, Joanne Fitzgerald Hamersley, Barbara A. Klocek, Gloria Lala, Patricia M. Moon, Judith Hopkins Pendleton, Lynn Mason Raymond, Janice Schmidt Rensch, Jeanette Byers Schlau, Rita Gardino Trubshaw, Terry Baker Van Horn, Diane M. Welty and Mary O'Connor Whitmore move for leave to intervene as plaintiffs in this action, in order to assert the claim set forth in their proposed complaint, a copy of which is attached, on the ground that the applicants' claims and the main action have questions of law and fact in common.

Attorneys for Plaintiffs have made every effort to communicate with all persons who may be eligible to intervene in this action as Plaintiffs as authorized by this Court on September 11, 1972. However, attorneys for Plaintiffs have been unable to locate seven persons of whom they are aware and therefore request that this Court allow attorneys for Plaintiffs to pursue their efforts to locate these persons by publishing notices in newspapers located in various stewardess domiciles and to allow such eligible persons to intervene as plaintiffs at such time as they may be located.

IRVING M. KING
RICHARD F. WATT
PEGGY A. HILLMAN
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

* * (Title Omitted in Printing) * *

INTERVENORS' COMPLAINT

The Plaintiff-Intervenors, by and through their attorneys, complain of the Defendant and state as follows:

1. This action arises under Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e *et seq.* Jurisdiction of this Court is invoked pursuant to such Act, particularly Title VII, Section 706(f) 42 U. S. C. Sec. 2000f.

2. Each Plaintiff-Intervenor is a person of the female sex who was employed by the Defendant as a flight cabin attendant, or airline stewardess, until her position was terminated by the Defendant. Each Plaintiff-Intervenor took actions to protest this termination.

a. Plaintiff-Intervenor, Evelyn A. Ambrose, commenced employment as a Stewardess with Defendant on or about March 17, 1965. Her employment was terminated on or about November 9, 1967. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant and by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII.

b. Plaintiff-Intervenor, Elizabeth Glenn Ashworth, commenced employment as a stewardess with Defendant on or about April 5, 1962. Her employment was terminated on or about October 19, 1962. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment

Opportunity Commission against Defendant in accordance with the provisions of Title VII.

c. Plaintiff-Intervenor, Sandra Moore Ballinger, commenced employment as a stewardess with Defendant on or about April 19, 1962. Her employment was terminated on or about January 17, 1967. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant.

d. Plaintiff Intervenor, Sarah A. Boling, commenced employment as a stewardess with Defendant on or about March 24, 1961. Her employment was terminated on or about February 17, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant.

e. Plaintiff-Intervenor Mary Weis, commenced employment as a stewardess with Defendant on or about October 9, 1959. Her employment was terminated on or about September 5, 1967. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the New York Division of Human Rights against Defendant.

f. Plaintiff-Intervenor, Carol Elaine Brackle, commenced employment as a stewardess with Defendant on or about June 11, 1962. Her employment was terminated on or about November 10, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant.

g. Plaintiff-Intervenor, Marlene Riehl Carney, commenced employment as a stewardess with Defendant on or about May 20, 1964. Her employment was terminated on

or about October 18, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment Opportunity Commission against Defendant, in accordance with the provisions of Title VII.

h. Plaintiff-Intervenor, Doris Rivas Collins, commenced employment as a stewardess with Defendant on or about January 13, 1965. Her employment was terminated on or about May 20, 1967. She protested this termination by filing charges with the Equal Employment Opportunity Commission against Defendant, in accordance with the provisions of Title VII.

i. Plaintiff-Intervenor, Catherine Reese Colvin, commenced employment as a stewardess with Defendant on or about April 18, 1963. Her employment was terminated on or about August 8, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant.

j. Plaintiff-Intervenor, Bernadette Dixon, commenced employment as a stewardess with Defendant on or about October 17, 1964. Her employment was terminated on or about February 7, 1968. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII.

k. Plaintiff-Intervenor, Susan Fusco, commenced employment as a stewardess with Defendant on or about August 15, 1956. Her employment was terminated on or about October 15, 1966. She protested this termination

by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant and by calling the Equal Employment Opportunities Commission.

l. Plaintiff-Intervenor, Helen Read Gunst, commenced employment as a stewardess with Defendant on or about February 21, 1965. Her employment was terminated on or about February 23, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing a charge with the New York Division of Human Rights.

m. Plaintiff-Intervenor, Joanne Fitzgerald Hamersley, commenced employment as a stewardess with Defendant on or about October 13, 1960. Her employment was terminated on or about December 22, 1967. She protested this termination by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII.

n. Plaintiff-Intervenor, Barbara A. Klocek, commenced employment as a stewardess with Defendant on or about August 22, 1963. Her employment was terminated on or about June 28, 1967. She protested this termination by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII.

o. Plaintiff-Intervenor, Gloria Lala, commenced employment as a stewardess with Defendant on or about July 11, 1956. Her employment was terminated on or about September 22, 1968. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant.

p. Plaintiff-Intervenor, Patricia M. Moon, commenced employment as a stewardess with Defendant on or about March 2, 1961. Her employment was terminated on or about November 12, 1967. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII.

q. Plaintiff-Intervenor, Judith Hopkins Pendleton, commenced employment as a stewardess with Defendant on or about March 8, 1962. Her employment was terminated on or about January 29, 1967. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant.

r. Plaintiff-Intervenor, Lynn Mason Raymond, commenced employment as a stewardess with Defendant on or about June 9, 1960. Her employment was terminated on or about June 14, 1966. She protested this termination by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII.

s. Plaintiff-Intervenor, Janice Schmidt Rensch, commenced employment as a stewardess with Defendant on or about August 20, 1966. Her employment was terminated on or about July 15, 1968. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant.

t. Plaintiff-Intervenor, Jeanette Byers Schlau, commenced employment as a stewardess with Defendant on or about June 21, 1962. Her employment was terminated on or about December 8, 1966. She protested this termination

by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII.

u. Plaintiff-Intervenor, Rita Gardino Trubshaw, commenced employment as a stewardess with Defendant on or about August 18, 1965. Her employment was terminated on or about July 9, 1968. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Lines Pilots Association, of which she was a member, and Defendant.

v. Plaintiff-Intervenor, Terry Baker Van Horn, commenced employment as a stewardess with Defendant on or about June 6, 1963. Her employment was terminated on or about January 12, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII.

w. Plaintiff-Intervenor, Diane M. Welty, commenced employment as a stewardess with Defendant on or about March 23, 1961. Her employment was terminated on or about November 9, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing a charge with the New York Division of Human Rights against Defendant.

x. Plaintiff-Intervenor, Mary O'Connor Whitmore, commenced employment as a stewardess with Defendant on or

about July 11, 1957. Her employment was terminated on or about January 1, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII.

3. Defendant, United Air Lines, Inc., is a corporation organized and existing by virtue of the laws of the State of Delaware. Its principal office is located in Elk Grove Village, Cook County, State of Illinois, which is within the Northern District of Illinois.

4. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer, among other practices, to fail or refuse to hire any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of sex, except where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

5. At all relevant times the Defendant maintained in effect a rule, regulation or policy, pertaining solely to females employed as stewardesses, requiring that stewardesses be unmarried when first employed and that they thereafter remain unmarried while so employed. The policy of Defendant, as in effect at the time of Plaintiff-Intervenors' terminations, calls for the termination of the employment of any stewardess who married.

6. Defendant hires both male and female employees. There is no rule, regulation or policy of the nature described in Paragraph 5 above which is or has been maintained or enforced against male employees of the Defendant. Pursuant to the above rule or regulation Defendant has terminated the employment of female stewardesses immediately upon notification of the mar-

riage of such employee, but no action is or has been taken against male employees upon marriage, and male employees are permitted to continue employment of Plaintiff-Intervenors as stewardesses pursuant to the above-described policy or rule and in violation of Title VII of the Civil Rights Act of 1964, for the sole reason that each is a female and became married while in the employ of Defendant in the capacity of stewardess.

7. Defendant has committed and is now intentionally committing unlawful employment practices with respect to the Plaintiff-Intervenors by discriminating against them because of their sex in summarily and arbitrarily terminating their employment as stewardesses because of their marriage.

8. The practices and actions of the Defendant described in Paragraphs 5, 6, and 7 above constitute unlawful employment practices in violation of Title VII, Section 2000e *et seq.*, of the Civil Rights Act of 1964. As a result thereof, the Plaintiff-Intervenors have been subjected to discrimination because of their sex with respect to conditions and privileges of employment all in violation of said statute. Plaintiff-Intervenors have been and are continuing to be wrongfully deprived of employment and substantial compensation as a direct and proximate result of the unlawful employment practices hereinabove described.

9. Plaintiff-Intervenors have no other remedy at law, and this suit is their only means of securing adequate relief.

WHEREFORE, Plaintiff-Intervenors pray that this Court issue an injunction restraining Defendant from discriminating against Plaintiff-Intervenors because of their sex in violation of Title VII of the Civil Rights Act of 1964; that the Court order the Defendant to reinstate Plaintiff-Intervenors in their positions as stewardesses; that the Court order the Defendant to make payment to each Plaintiff-Intervenor equal to all loss of compensation from the time of her illegal discharge to the date of reinstatement; that the Court order Defendant to restore to each

Plaintiff-Intervenor any and all employment privileges and opportunities, including all rights of seniority or longevity of employment, which would have accrued to her had her employment not been interrupted by the unlawful discharge; that the Court order, adjudge and declare that the rule, regulation or policy of the Defendant under which Defendant discharges females from their employment as stewardesses is unlawful and unenforceable and restrain and enjoin its enforcement in the future; and that the Court order and decree such other and further relief as may be deemed just.

RICHARD F. WATT
IRVING M. KING
PEGGY A. HILLMAN
By: /s/ PEGGY A. HILLMAN
Attorneys for Plaintiff-Intervenors

UNITED STATES DISTRICT COURT
* * (Title Omitted in Printing) * *

AFFIDAVIT.

C. P. Hutchens, being first duly sworn, on oath deposes and says:

1. I am the Director of Employment and Placement for United Air Lines, Inc., and have knowledge of the facts set forth herein.

2. The number of stewardesses in the employ of United as of the following respective dates was:

December 31, 1968	4900
December 31, 1969	5401
December 31, 1970	5971
December 31, 1971	5278
September 30, 1972	6401

3. The average length of service of all stewardesses in the employ of United as of December 31, 1969 was 2.9 years.

4. Between November 1, 1968 and December 31, 1971, 455 stewardesses voluntarily resigned from employment with United, assigning marriage as the reason. During the same period, 363 stewardesses went on leave of absence because of marriage and did not thereafter return to work upon termination of leave of absence.

5. I have read the affidavit of Daniel E. Kain, dated September 25, 1972, relating to the above-captioned matter and am familiar with its contents. On or about January 3, 1969, United offered unconditional reinstatement to those stewardesses described in paragraph 3 of the Kain affidavit who had not accepted the settlement offer of November 14, 1968, or who had not tendered resignation.

/s/ C. P. HUTCHENS

Subscribed and sworn to before me this 6th day of November, 1972.

/s/ EARL G. DOLAN,
Notary Public.

My commission expires: October 19, 1976.

IN THE UNITED STATES DISTRICT COURT
* * (Title Omitted in Printing) * *

MEMORANDUM AND ORDER

Plaintiffs Carole Anderson Romasanta and Brenda Bailes Altman are former stewardesses employed by defendant United Air Lines, Inc. ("United"). They allege they have been subjected to discrimination because of their sex with respect to conditions and privileges of their employment. Their action challenges the validity, under Title VII of the Civil Rights Act of 1964, of United's policy that stewardesses in its employ be and remain unmarried.

The suit was brought as a class action to secure relief similar to that granted by this court in *Sprogis* v. *United Air Lines, Inc.*, No. 68 C2311. On January 21, 1970 in its decision in *Sprogis*, this court found that United's enforcement of its no-marriage policy for stewardesses resulted in her discharge and discriminated against Mrs. Sprogis because of her sex. It ordered, among other things, the taking of an accounting as to her claim for compensation for lost pay. United appealed. On June 16, 1971 the Court of Appeals affirmed this court's ruling in *Sprogis* and on December 14, 1971 the Supreme Court denied United's petition for writ of certiorari.

Approximately four months after this court's decision in *Sprogis* the complaint in this case was filed on May 15, 1970. In *Sprogis* the court had left open the question as to whether the relief afforded Mrs. Sprogis should be made applicable to other stewardesses discharged by United pursuant to its no-marriage policy. The *Romasanta* case was held on the court's past case calendar while disposition of Sprogis was pending in the courts above. Upon remand the court considered the issue of whether class relief was appropriate in *Sprogis* and a motion to consolidate *Romasanta* with *Sprogis*.

In its Memorandum and Order of June 14, 1972, the court denied the motion to convert *Sprogis* into a class action and to consolidate it with *Romasanta* for reasons in its Memorandum and Order set forth. Among other things the court therein pointed out that after it appeared Mrs. Sprogis was to have relief the Romasanta action was brought here and other stewardesses sought to benefit *after a decision on the merits.* The court found it would be unjust to defendant to allow one-way intervention for if class relief were extended, it was probable no class member would decline to join in a chance for monetary reward once the discrimination issue had been determined. However, it again pointed out that the relief granted on the discrimination issue in *Sprogis,* if found applicable, could be extended to other stewardesses but that they must present their cases on the merits. The court specifically stated that its views were in no way prejudicial to the eventual disposition of the *Romasanta* case on its merits. (The *Sprogis* case is now continuing as an individual action for the purpose of determining her lost pay.)

Defendant United has moved the court to strike all allegations of the *Romasanta* complaint relating to class action and to direct the matter to proceed as an individual action on behalf of plaintiffs Carole Anderson Romasanta and Brenda Bailes Altman. At subsequent hearings the court indicated it was of the opinion the action should not proceed as a class action although it would allow additional stewardesses to intervene by way of joinder as addition[al] parties plaintiff if their joinder is proper. Thereafter a motion to intervene was filed by 24 individuals.

The court has considered the motion to strike the class allegations and the motion to intervene, the memoranda of counsel for the parties and those affidavits and exhibits submitted. It has heard argument of counsel at several hearings. It now is of the opinion those individuals allowed to join in this action should be limited to all former stewardesses who resigned or who were terminated because of United's said policy between July 2, 1965 and November 7, 1968 and who thereafter pro-

tested the no-marriage policy or termination by filing a valid grievance under the applicable bargaining agreement between United and the Air Line Pilots Association ("ALPA") or a valid complaint with the Equal Employment Opportunity Commission ("EEOC") or any appropriate State agency. It will exclude, however, any present or former stewardess of United who has accepted an offer of reinstatement pursuant to the agreement between United and ALPA, or any stewardess who voluntarily withdrew or abandoned her claim, or who pursued any other administrative or judicial remedy to conclusion.

Involved here are some stewardesses who resigned because of marriage and did protest the no-marriage policy of United by filing grievances under the collective bargaining agreement between defendant and ALPA or by filing charges under Title VII. Defendant contends others did not protest and it is reasonable for the union and defendant United to assume that since they did not protest they had no further interest in further employment. It appears to the court intervenors should be limited to those who protested, did not settle and were truly interested in employment.

On November 7, 1968 United revoked its no-marriage policy by agreement with the Air Line Pilots Association, the authorized collective bargaining representative of the stewardesses in United's employ. Under the agreement United offered reinstatement to all stewardesses terminated as a consequence of the no-marriage policy and who had filed a valid grievance under the collective bargaining agreement or a valid complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 or before State agencies. Said Letter of Agreement stated, in part: "Acceptance of reinstatement will be in full satisfaction of any grievance or complaint filed by such stewardesses."

According to the defendant, 30 stewardesses qualified for and were offered reinstatement under the said agreement; eleven accepted; three tendered resignations; two did not respond and United received no further communication from them. Some

instituted civil actions. Three of the 30 now have claims pending before the State of New York Division of Human Rights.

Defendant in its response to the motion of the 24 to intervene does not object to the intervention as plaintiffs of eight stewardesses. The court, therefore, will grant the motion to intervene of these eight, namely, Sandra Moore Ballinger, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn and Mary O'Connor Whitmore. It appears these eight individuals protested their termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between United and ALPA, of which they were members. Some of them also filed charges with the EEOC. As to Marlene Riehl Carney it appears that a dispute has been resolved as to whether she did nor did not file a grievance under the collective bargaining agreement, and upon a hearing defendant indicated no objection to her joinder. Marlene Riehl Carney is therefore added as an additional party plaintiff.

Defendant objects to the inclusion of seven stewardesses on the grounds that they accepted reinstatement in full satisfaction of any grievance or complaint they had pursuant to the agreement aforesaid between United and ALPA. Plaintiffs' attorney argues the acceptance of reinstatement does not preclude them from pursuing their remedy under Title VII. They accepted reinstatement in full satisfaction of their grievance. The motion to intervene is denied as to these seven, namely, Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala, Patricia M. Moon, Janice Schmidt Rensch and Jeanette Byers Schlau.

Three others of the 24 seeking to intervene here, namely, Mary Weis, Helen Read Gunst and Diane M. Welty, have filed charges with the New York Division of Human Rights against United. Upon hearing it appears the issues of liability has already been determined there and that the issue of the amount of such liability is being determined. Although counsel argues that these three should be included in the suit here until such

time as the settlement of their claims is actually consummated and "scrutinized" by this court, it is sufficient that they are pursuing their remedies to near conclusion elsewhere. Their exclusion does not preclude their bringing their own action if the settlements are not consummated. The motion of Mary Weis, Helen Read Gunst and Diane M. Welty to intervene in this action is denied.

Upon hearing it was also determined Doris Rivas Collins has filed an action in the District Court of Washington at Seattle. She is pursuing her judicial remedy elsewhere and her motion to intervene in this action is also denied.

To its response to the motion to intervene, United attached copies of letters from Evelyn A. Ambrose in which she accepted an offer of reinstatement pursuant to the United and ALPA agreement. United further represents that she did not wish reinstatement but was withdrawing her grievance. In her case plaintiffs' attorney contends that her acceptance did not have the effect of precluding her from pursuing a remedy under Title VII and denies that her acceptance without reinstatement constituted a binding waiver or revocation of her rights. Mrs. Ambrose accepted an offer of reinstatement and withdrew her grievance. Her motion to intervene here is denied.

The facts as to the situations of the three remaining who seek to intervene are more in controversy. United objects to the inclusion here of Rita Gardino Trubshaw on the ground she made no response to a letter of November 14, 1968 offering her reinstatement and did not communicate with United and it contends she therefore abandoned her claim. This is disputed. In Mrs. Trubshaw's case it is contended that she notified United of her rejection of the offer, that she did not receive a second unconditional offer of reinstatement and that she did not withdraw her grievance or abandon her claim. In the case of Lynn Mason Raymond defendant objects on the ground she did not file a valid grievance under the collective bargaining agreement nor, to its knowledge, with the EEOC. It appears her employment was terminated in 1966. Attached to plaintiff-intervenor's

reply is an exhibit showing Mrs. Raymond did file charges with the EEOC and that the District Director of the EEOC made findings relative to her complaint. Defendant also objects to the inclusion of Joanne Fitzgerald Hamersley on the ground that it has no knowledge she filed a valid grievance under the collective bargaining agreement or with EEOC. It appears from the exhibits Mrs. Hamersley did file charges of discrimination with the EEOC in November and December 1970. She sets forth she resigned voluntarily December 23, 1967 because she was getting married.

The court will allow these three, namely, Rita Gardino Trubshaw, Lynn Mason Raymond and Joanne Fitzgerald Hamersley to join in this action.

In considering the equities, it does not seem fair and reasonable to this court that it should allow a stewardess terminated prior to November 7, 1968 to intervene here unless she indicated in a timely manner her desire to continue working by taking some affirmative action to protest United's policy or seek reinstatement.

Attorneys for plaintiffs say they have made every effort to communicate with all persons who may be eligible to intervene in this action as plaintiffs as authorized by this court on September 11, 1972 but have been unable to locate seven persons of whom they are aware. They request the court to allow them to pursue their efforts to locate these persons by publishing notices in newpapers in various stewardess domiciles and then to allow them to intervene as they may be located. That part of the motion to intervene is denied.

It is ordered that all allegations of the complaint relating to class action be stricken and that this action not proceed as a class action. The class of plaintiffs who protested their termination does not meet the numerosity requirement of Rule 23(a) of the Federal Rules of Civil Procedure. Those individuals whose motions to intervene are being granted will come in by way of joinder as additional parties plaintiff. Based on the con-

troversies already evident between counsel on the fact situations as to various stewardesses, the court is more than ever convinced a class action would not be expeditious or efficient. The court itself has attempted to chart the situations as to each of the 24 individuals seeking to intervene, and based on only what is before it is more than ever convinced that it has a series of individual suits within a suit, that the merits may vary from individual to individual, that all are not similarly situated.

The motion to intervene is granted as to Sandra Moore Ballinger, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn, Mary O'Connor Whitmore and Marlene Riehl Carney. It is denied as to Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala, Patricia M. Moon, Janice Schmidt Rensch, Jeanette Byers Schlau, Mary Weis, Helen Read Gunst, Diane M. Welty, Evelyn A. Ambrose and Doris Rivas Collins. The motion to intervene as it relates to Rita Gardino Trubshaw, Lynn Mason Raymond and Joanne Fitzgerald Hamersley also is granted. Defendant United is ordered to answer within twenty days.

The court is of the opinion that its order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from its order may materially advance the ultimate termination of the litigation.

ENTER:

/s/ J. S. PERRY

Judge

Dated: December 6, 1972.

IN THE UNITED STATES COURT OF APPEALS.
* * (Title Omitted in Printing) * *

PETITION FOR PERMISSION TO APPEAL.

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Plaintiffs Carole Anderson Romasanta and Brenda Bailes Altman, on behalf of themselves and all others similarly situated, respectfully petition this Court, pursuant to the provisions of 28 U. S. C. § 1292(b) and Rule 5, Federal Rules of Appellate Procedure, for permission to appeal from an Order of the United States District Court for the Northern District of Illinois, Eastern Division, and in support thereof respectfully represent:

1. This petition seeks permission to appeal from a Memorandum and Order entered on December 6, 1972, a copy of which is attached hereto. The Memorandum and Order struck the class action allegations of the Complaint and directed that the action proceed as an individual action. The Memorandum and Order further denied the motion of twelve Plaintiff-Intervenors to join the suit as Parties-Plaintiff.

2. The District Court was of the opinion that its Order involved controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from its Order may materially advance the ultimate termination of the litigation, and has so certified. (Memo, pp. 10-11.) Such a statement is a prerequisite to the filing of a petition for permission to appeal in this Court under 28 U. S. C. § 1292(b).

STATEMENT OF FACTS.

1. Plaintiffs, and the class they seek to represent, are former Stewardesses employed by Defendant, United Air Lines, Inc., whose jobs were terminated by reason of their marriage in conformance with Defendant's policy which required that Stewardesses be unmarried. Their Complaint alleges that their job terminations constituted unlawful discrimination because of sex, in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000(e)). The action was framed as a class action to secure relief for the class of Stewardesses similarly situated with the Plaintiff in *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), which had not been pleaded initially as a class action. The present case was held in abeyance pending disposition of *Sprogis* on appeal from the District Court's Order granting summary judgment for the Plaintiff. This Court, on June 16, 1971, affirmed the decree of the District Court in *Sprogis*, finding that Defendant's enforcement of its no-marriage policy for stewardesses discriminated on the basis of sex (444 F. 2d 1194). On December 14, 1971 the United States Supreme Court denied the Defendant's petition for writ of certiorari (404 U. S. 991).

2. Upon this Court's remand of *Sprogis* to the District Court, the Plaintiff in *Sprogis*, on February 15, 1972, filed a memorandum on the scope of the class entitled to relief. The question of extending relief in *Sprogis* to a class had been left open in the District Court's decree and the District Court's power to consider such action had been affirmed by this Court in its decision. Plaintiff urged that the relief afforded to the individual plaintiff in *Sprogis* should be made available to the following class of persons:

Class I:

> All persons employed by United Air Lines, Inc. as stewardesses who were discharged by United pursuant to its no-marriage policy between the dates of July 2, 1965 and November 7, 1968.

Class II:

> All persons employed by United Air Lines, Inc. as stewardesses who resigned from their employment upon their marriage between July 12, 1965 and November 7, 1968 as required by United's no-marriage

policy, and who complained against United's no-marriage rule by filing grievances under a collective bargaining agreement between United and the Air Line Pilots Association, or by filing charges under Title VII of the 1964 Act or under other state or federal laws, regulations, or executive orders banning discrimination in employment because of sex.

The plaintiffs in both cases also moved to consolidate *Sprogis* and *Romasanta*. On June 14, 1972 the District Court denied the Motions to convert *Sprogis* into a class action after judgment on the merits when it had not been pleaded as a class action, and refused to consolidate *Sprogis* and *Romasanta*.

3. Plaintiffs then commenced discovery proceedings in *Romasanta*, which, of course, had been pleaded initially as a class action, in an endeavor to determine the identity and number of persons in the class of Plaintiffs by serving a notice of deposition and a request for production of documents on Defendant in June, 1972. On June 22, 1972 Defendant filed a motion to strike the class action allegations of the *Romasanta* complaint, which the District Court took under advisement on July 28, 1972, pending discovery by Plaintiffs as to the characteristics and identity of the class. Plaintiffs had argued that they were unable adequately to respond to Defendant's motion to strike without further factual information about the Stewardesses who might be members of the class, and, further, that the District Court could not properly rule on the Defendant's motion without such additional factual information. After examining a computer tabulation of all Stewardesses who resigned or were discharged by Defendant from 1966 to the present, made available by Defendant, Plaintiffs determined that there is very likely a substantially greater number of Stewardesses who were discharged due to marriage than had previously been contemplated, possibly over one hundred. Plaintiffs then sought to examine Defendant's files on each Stewardess who appeared likely to have been discharged due to marriage. This discovery was effectively terminated on

September 11, 1972 when the District Court announced that it was prepared to grant Defendant's motion to strike the class action allegations of the complaint.

4. At a hearing on September 11, 1972, in the absence of any evidentiary hearing or argument or briefs counsel, the District Court stated that it was prepared to grant Defendant's motion to strike the class action allegations of the complaint and would allow only those Stewardesses who formally protested their job terminations to enter the suit by joinder as plaintiffs. Defendant submitted a proposed order embodying this ruling. Attached to this proposed order were two affidavits executed by officers of Defendant containing a wide variety of factual assertions purporting to support findings of fact contained in Defendant's proposed order. Plaintiffs objected to the proposed order and objected to the submission of these affidavits since plaintiffs had no meaningful opportunity, without additional discovery, to counter these affidavits and had no opportunity to cross-examine Defendant's witnesses concerning virtually every disputed issue in the case. Relying on the District Court's oral ruling, counsel for Plaintiffs submitted a motion to intervene on behalf of twenty-four Stewardesses who had protested their job terminations.

5. On December 6, 1972 the District Court entered its formal Order from which the Plaintiffs are hereby seeking permission to appeal, striking the class action allegations of the complaint and denying the motion to intervene as to twelve of the Stewardesses who had sought to enter the case by this means. The District Court's Order and Memorandum limited the class of Stewardesses eligible to pursue a Title VII claim to those who formally protested their terminations by filing a valid grievance under the governing collective bargaining agreement or a valid complaint with the Equal Employment Opportunity Commission or any appropriate state agency, even where such Stewardesses had been fired outright (Memo, p. 4).

The District Court thus accepted Defendant's factual assertion that any Stewardess who did not protest her termination due to

marriage had no interest in further employment and thus should not be allowed the opportunity to seek any remedy under Title VII (Memo, p. 4). The Court's requirement of a protest of the terminations, in other words, is not based upon any concept of necessity for exhausting administrative remedies; rather, protest is viewed as necessary because, according to Defendant and the District Court, one must make some outcry to show a continuing interest in one's job, despite the fact that the termination was concededly a violation of Title VII and other persons in the class have fulfilled the statutory prerequisites for bringing a Title VII action. Having thus excluded the bulk of the Stewardesses discharged by reason of Defendant's no-marriage policy, the District Court found the class of plaintiffs who protested their terminations did not meet the "numerosity" requirement of Rule 23(a) of the Federal Rules of Civil Procedure and thus dismissed the class action (Memo, p. 9).

The District Court's Order further narrowed the group of Stewardesses eligible to participate in the action (even by joinder as plaintiffs) by excluding any Stewardess who had previously accepted an offer of reinstatement by the Defendant which contained a statement requiring the relinquishment of pending claims as a condition of acceptance. The District Court found, in the absence of any hearing or evidence on the point, that, in accepting this conditional offer of reinstatement, each Stewardess knowingly and intentionally waived all rights to pursue any remedy under Title VII.

The effect of the District Court's ruling is to allow those individuals who protested their terminations and who rejected Defendant's first conditional offer of reinstatement, made on November 14, 1968, and who then accepted Defendant's second unconditional offer of reinstatement made on January 3, 1969 or who were erroneously omitted from Defendant's list of thirty protesting Stewardesses to participate in this lawsuit.

The District Court's Order and Memorandum was entered before Plaintiffs had a chance to complete sufficient discovery on

the number of persons in the class and in the absence of an evidentiary hearing on any of the factual determinations made in the District Court's Memorandum. Included in the District Court's Memorandum are factual findings based on affidavits submitted by Defendant which, in the absence of the right to cross-examine Defendant's affiants at a hearing, and in the absence of any meaningful discovery, Plaintiffs had no opportunity to counter.

The Controlling Questions of Law

1. Whether persons whose employment has been terminated because of their sex, a reason proscribed by Title VII of the Civil Rights Act of 1964, are required to protest their terminations by filing grievances or charges in order to become entitled to relief in a class action under Title VII. Whether, in other words, there is a requirement in Title VII that one must take such steps simply to show an interest in continued employment in order to be entitled to relief in a class suit.

2. The District Court found that every Stewardess whose employment was terminated due to marriage but who did not formally protest this termination was not truly interested in further employment and thus was ineligible to pursue a claim of employment discrimination under Title VII. Did the District Court err in making this finding in the absence of an evidentiary hearing, thereby denying Plaintiffs the right to be heard and to offer evidence showing that many, if not all, Stewardesses who did not protest their terminations due to marriage were truly interested in regaining their employment?

3. Is acceptance of an offer of reinstatement conditioned on the abandonment of pending claims necessarily effective to waive all rights under Title VII of the 1964 Civil Rights Act?

4. The District Court found that every Stewardess who accepted Defendant's conditional offer of reinstatement accepted reinstatement in full satisfaction of her claims and thus knowingly and intentionally waived her rights to pursue any claims

under Title VII of the 1964 Civil Rights Act. Did the District Court err in making this finding in the absence of an evidentiary hearing, thereby denying Plaintiffs their right to be heard and to present evidence showing that some, if not all, Stewardesses who accepted Defendant's offer of reinstatement were unaware of the remedies available under Title VII of the Civil Rights Act or were unaware of the effect of accepting this offer of reinstatement and thus did not knowingly and intentionally waive their right to pursue their claims under Title VII of the 1964 Civil Rights Act?

5. The District Court struck the class action allegations of the complaint for the reason that the class of plaintiffs does not meet the "numerosity" requirement of Rule 23(a) of the Federal Rules of Civil Procedure. Did the District Court err in striking the class action in absence of an evidentiary hearing preceded by an adequate opportunity for discovery of the extent, nature and characteristics of the class?

Reasons Why a Substantial Basis Exists for a Difference of Opinion on the Controlling Questions of Law.

1. This Court and numerous other courts have rejected the notion that relief under Title VII of the 1964 Civil Rights Act is available only to parties who have themselves filed charges or otherwise protested. Contrary to the conclusion of the District Court, the law is clear that a representative plaintiff who has exhausted his administrative remedies by filing charges with the Equal Employment Opportunities Commission may bring a class action on behalf of others subjected to the same discrimination but who did not themselves file EEOC charges or otherwise protest. *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969); *Butler* v. *Local 4 and Local 269, Laborers Int'l. Union*, 308 F. Supp. 523 (N. D. Ill. 1969); *Local 186, Int'l. Pulp Sulphite & Paper Mill Workers* v. *Minn. Mining & Mfg. Co.*, 304 F. Supp. 1284 (N. D. Ind. 1969); *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968);

Jenkins v. *United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1969). Once a single individual has exhausted the administrative requirements all other persons similarly situated are entitled to seek relief as members of a class represented by the exhausting person in his or her action, without the necessity of their doing *anything* on their part. The District Court's ruling misconstrues the requirements of Title VII and flies in the face of clear precedent.

2. The District Court's ruling that acceptance of a private agreement requiring the relinquishment of any claim is effective to waive all rights under Title VII of the 1964 Civil Rights Act is contrary to the policy considerations underlying the prohibition of discrimination in that Act as enunciated by this Court and other Courts.

Actions brought pursuant to Title VII are suits to vindicate the public's interest in eliminating proscribed discriminatory practices. This Court, in *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 719 (7th Cir. 1969) stated:

> In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401-402, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968), the court held that since vindication of the public interest is dependent upon private suits, the suits are private in form only and a plaintiff who obtains an injunction does so "as a 'private attorney general', vindicating a policy that Congress considered of the highest priority."

This Court also noted in *Bowe* that in Title VII actions the trial court bears a special responsibility in the public interest to resolve the dispute by determining the facts (416 F. 2d at 715). See also *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1968); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122 (5th Cir. 1969). The District Court's Order upholding private agreements conditioned on the waiver of any claim and thereby precluding any possibility of suit under Title VII of the 1964 Civil Rights Act is directly contrary to this established policy.

Moreover, by analogizing to identical situations in the field of labor relations which this Court found to be not merely compelling, but conclusive in *Bowe, supra,* at 714, the District Court's ruling upholding the private settlement agreements in this case must be reversed. In labor contexts, it is well established that private settlements of unfair labor practices, including a union's waiver of back pay for its members, does not prevent the National Labor Relations Board from retaining jurisdiction and entering a remedial order if such order is deemed necessary to effectuate the policies of the National Labor Relations Act. *N. L. R. B.* v. *E. A. Laboratories,* F. 2d 885 (2nd Cir. 1951) cert. den. 342 U. S. 871; *Safeway Stores, Inc.,* 148 NLRB 660 (1964); *Monroe Feed Stores,* 122 NLRB 1479 (1959); *Aacon Contracting Company,* 127 NLRB 1250 (1960).

3. Elementary and fundamental considerations of procedural due process mandate the opportunity to be heard, to present evidence, and to cross-examine opposing witnesses on disputed issues of fact.

The District Court in this case issued its Memorandum and Order in the absence of any evidentiary hearing. That Memorandum and Order contain numerous factual findings on which Plaintiffs had no opportunity to present evidence. The District Court accepted factual assertions made by way of Defendant's affidavits which factual assertions Plaintiffs had no meaningful way to counter or to discredit.

In the absence of a hearing, the District Court found that Stewardesses who did not formally protest their terminations due to marriage were not interested in securing reinstatement. This factual determination was reached by the District Court by accepting Defendant's assertion made in an *ex parte* affidavit, without affording Plaintiffs a meaningful opportunity to present evidence or to cross-examine Defendant's affiants.

Without any factual basis, by affidavit or otherwise, the District Court further found that any Stewardess who accepted

an offer of reinstatement conditioned on the abandonment of claims in fact knowingly and intentionally waived all rights to pursue any Title VII claim. Clearly, to determine the fact of waiver by individuals of substantial statutory rights, there must be evidence showing an intelligent and intentional act and there must be evidence showing that the individual had an understanding that there existed a right which is the subject of choice. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938); *United States ex rel. Bolognese* v. *Brierly,* 412 F. 2d 193 (3rd Cir. 1969), cert. den. 397 U. S. 942; *United States* v. *Escandar,* 465 F. 2d 438 (5th Cir. 1972).

The District Court struck the class action allegations of the complaint without affording Plaintiffs an adequate opportunity for discovery and without any evidentiary hearing. In such a posture, the District Court erred in deciding the issue of the propriety of the class action. *Herbst* v. *Able,* 278 F. Supp. 664 (S. D. N. Y. 1967), 45 F. R. D. 451 (1968); *Burstein* v. *Slote,* 12 F. R. Serv. 2d 23c. 1 case 2 (S. D. N. Y. 1968), cf. *Tolbert* v. *Western Electric Co.,* 56 F. R. D. 108 (N. D. Ga. 1972).

Reasons Why an Immediate Appeal May Materially Advance the Termination of the Litigation.

The District Court's Order and Memorandum substantially alters the nature of this suit. Instead of a class action composed of possibly well over one hundred members, the District Court's Order converts the suit to an individual action on behalf of fourteen individuals. The District Court's Order precludes the bulk of Stewardesses discharged by reason of their marriage from seeking reinstatement and back pay. If this appeal is accepted and if the District Court's Order is reversed, the final stage of this lawsuit, the determination of the damages owing to Stewardesses now deemed to be ineligible to recover, would be materially advanced. The alternative, if this appeal is not permitted until the final judgment in the District Court, would

not only delay the final termination of the case but also would result in the duplication of damage award proceedings, since the damages owing to the fourteen persons now joined in the suit would then have been determined. Moreover, delay imposes an unnecessary burden on Stewardesses—all of whom were discharged due to marriage prior to November 1968; the longer the delay, the less likely that an individual will be in a position to disrupt her established way of living in order to accept reinstatement as a Stewardess. For these reasons, an immediate appeal of the issues decided in the District Court's Order and Memorandum may materially advance the termination of the litigation.

Wherefore, Petitioners respectfully pray that this petition be granted and that they be permitted to appeal from the District Court's Order and Memorandum under the provisions of 28 U. S. C. § 1292(b).

RICHARD F. WATT
IRVING M. KING
PEGGY A. HILLMAN
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

* * (Title Omitted in Printing) * *

ANSWER TO INTERVENORS' COMPLAINT

Now comes defendant United Air Lines, Inc., by its attorneys, and for its Answer to the Intervenors' Complaint states and alleges as follows:

> "1. This action arises under Title VII of the Civil Rights Act of 1962, 42 U. S. C. Section 2000e *et seq.* Jurisdiction of this Court is invoked pursuant to such Act, particularly Title VII, Section 706(f) 42 U. S. C. Sec. 2000f."

1. Defendant admits the allegations of paragraph 1 but denies any implication that defendant has violated that Act.

> "2. Each Plaintiff-Intervenor is a person of the female sex who was employed by the Defendant as a flight cabin attendant, or airline stewardess, until her position was terminated by the Defendant. Each Plaintiff-Intervenor took actions to protest this termination."

2. Defendant admits the allegations of paragraph 2 that plaintiffs-intervenors are females who were employed by defendant as stewardesses but denies that all plaintiffs-intervenors were terminated and that each plaintiff-intervenor took action to protest the alleged termination.

> "c. Plaintiff-Intervenor, Sandra Moore Ballinger, commenced employment as a stewardess with Defendant on or about April 19, 1962. Her employment was terminated on or about January 17, 1967. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant."

a. Defendant admits the allegations in paragraph 2c. Further answering said paragraph, defendant states that Sandra Moore Ballinger was offered and accepted reinstatement effec-

tive February 1, 1969 but then chose not to return to work as a stewardess.

> "d. Plaintiff Intervenor, Sarah A. Boling, commenced employment as a stewardess with Defendant on or about March 24, 1961. Her employment was terminated on or about February 17, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant."

b. Defendant admits the allegations in paragraph 2d. Further answering said paragraph, defendant states that Sarah A. Boling was offered and accepted reinstatement effective February 1, 1969 but then chose not to return to work as a stewardess.

> "f. Plaintiff-Intervenor, Carol Elaine Brackle, commenced employment as a stewardess with Defendant on or about June 11, 1962. Her employment was terminated on or about November 10, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Lines Pilots Association, of which she was a member, and Defendant."

c. Defendant admits the allegations in paragraph 2f.

> "g. Plaintiff-Intervenor, Marlene Riehl Carney, commenced employment as a stewardess with Defendant on or about May 20, 1964. Her employment was terminated on or about October 18, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment Opportunity Commission against Defendant, in accordance with the provisions of Title VII."

d. Defendant admits the allegations in paragraph 2g except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that Marlene Riehl

Carney protested termination by filing charges with the Equal Employment Opportunity Commission against defendant, in accordance with the provisions of Title VII. Further answering said paragraph, defendant states that Marlene Riehl Carney abandoned her grievance by failing to follow the grievance procedures established in the collective bargaining agreement between the Air Line Pilots Association and defendant.

> "i. Plaintiff-Intervenor, Catherine Reese Colvin, commenced employment as a stewardess with Defendant on or about April 18, 1963. Her employment was terminated on or about August 8, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant."

e. Defendant admits the allegations in paragraph 2i. Further answering said paragraph, defendant states that Catherine Reese Colven was offered and accepted reinstatement effective February 1, 1969.

> "k. Plaintiff-Intervenor, Susan Fusco, commenced employment as a stewardess with Defendant on or about August 15, 1956. Her employment was terminated on or about October 15, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant and by calling the Equal Employment Opportunities Commission."

g. Defendant admits the allegations in paragraph 2k, except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that she called the Equal Employment Opportunity Commission. Further answering said paragraph, defendant states that Susan Fusco was offered and accepted reinstatement effective February 1, 1969, that she returned to work as a stewardess and that she resigned on September 12, 1969.

> "m. Plaintiff-Intervenor, Joanne Fitzgerald Hamersley, commenced employment as a stewardess with Defendant

on or about October 13, 1960. Her employment was terminated on or about December 22, 1967. She protested this termination by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII."

h. Defendant denies the allegations in paragraph 2m except that defendant admits that Joanne Fitzgerald Hamersley commenced employment as a stewardess with defendant on or about October 13, 1960. Further answering said paragraph, defendant states that Joanne Fitzgerald Hamersley resigned on December 23, 1967.

"q. Plaintiff-Intervenor, Judith Hopkins Pendleton, commenced employment as a stewardess with Defendant on or about March 8, 1962. Her employment was terminated on or about January 29, 1967. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant."

i. Defendant admits the allegations in paragraph 2q. Further answering said paragraph, defendant states that Judith Hopkins Pendleton was offered and accepted reinstatement effective February 1, 1969, that she returned to work as a stewardess and that she resigned on October 6, 1969.

"r. Plaintiff-Intervenor, Lynn Mason Raymond, commenced employment as a stewardess with Defendant on or about June 9, 1960. Her employment was terminated on or about June 14, 1966. She protested this termination by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII."

j. Defendant denies the allegations in paragraph 2r except that it admits that Lynn Mason Raymond commenced employment as a stewardess with defendant on or about June 9, 1960. Further answering said paragraph, defendant states that Lynn Mason Raymond was terminated on or about June 4, 1966 and that she did not protest this termination in any manner.

"u. Plaintiff-Intervenor, Rita Gardino Trubshaw, commenced employment as a stewardess with Defendant on or about August 18, 1965. Her employment was terminated on or about July 9, 1968. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant."

k. Defendant admits the allegations in paragraph 2u.

"v. Plaintiff-Intervenor, Terry Baker Van Horn, commenced employment as a stewardess with Defendant on or about June 6, 1963. Her employment was terminated on or about January 12, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII."

l. Defendant admits the allegations in paragraph 2v.

"x. Plaintiff-Intervenor, Mary O'Connor Whitmore, commenced employment as a stewardess with Defendant on or about July 11, 1957. Her employment was terminated on or about January 1, 1966. She protested this termination by filing a grievance pursuant to the provisions of the collective bargaining agreement between the Air Line Pilots Association, of which she was a member, and Defendant, and by filing charges with the Equal Employment Opportunity Commission against Defendant in accordance with the provisions of Title VII."

m. Defendant admits the allegations in paragraph 2x. Further answering said paragraph, defendant states that Mary O'Connor Whitmore was offered and accepted reinstatement effective January 26, 1969, that she returned to work as a stewardess and that she resigned on July 30, 1970.

"3. Defendant, United Air Lines, Inc., is a corporation organized and existing by virtue of the laws of the State of Delaware. Its principal office is located in Elk Grove Village, Cook County, State of Illinois, which is within the Northern District of Illinois."

3. Defendant admits the allegations of paragraph 3.

"4. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer, among other practices, to fail or refuse to hire any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of sex, except where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

4. Paragraph 4 paraphrases provisions of Title VII of the Civil Rights Act of 1964 and requires no answer.

"5. At all relevant times the Defendant maintained in effect a rule, regulation or policy, pertaining solely to females employed as stewardesses, requiring that stewardesses be unmarried when first employed and that they thereafter remain unmarried while so employed. The policy of Defendant, as in effect at the time of Plaintiff-Intervenors' terminations, calls for the termination of the employment of any stewardess who married."

5. Defendant admits the allegations of paragraph 5 except that it denies any implication that such policy is presently in effect and any implication that all the plaintiffs-intervenors were terminated pursuant to such policy.

"6. Defendant hires both male and female employees. There is no rule, regulation or policy of the nature described in Paragraph 5 above which is or has been maintained or enforced against male employees of the Defendant. Pursuant to the above rule or regulation Defendant has terminated the employment of female stewardesses immediately upon notification of the marriage of such employee, but no action is or has been taken against male employees upon marriage, and male employees are permitted to continue employment of Plaintiff-Intervenors as stewardesses pursuant to the above-described policy or rule and in violation of Title VII of the Civil Rights Act of 1964, for the sole reason that each is a female and became married while in the employ of Defendant in the capacity of stewardess."

6. Defendant admits the allegations of paragraph 6 that it hires both male and female employees; that there is no rule, regulation or policy as described in paragraph 5 of the Complaint which has been maintained or enforced against male employees; that pursuant to such policy defendant has dismissed stewardesses immediately upon notification of marriage and that no such action has been taken against male employees upon marriage, and male employees are permitted to continue employment without regard to marital status. Defendant denies the allegation of paragraph 6 that the plaintiffs-intervenors were terminated in violation of Title VII of the Civil Rights Act of 1964. Further answering said paragraph, defendant states that such policy has never been in effect with respect to female employees other than stewardesses, and that such policy is not currently in effect with respect to stewardesses.

"7. Defendant has committed and is now intentionally committing unlawful employment practices with respect to the Plaintiff-Intervenors by discriminating against them because of their sex in summarily and arbitrarily terminating their employment as stewardesses because of their marriage."

7. Defendant denies the allegations of paragraph 7.

"8. The practices and actions of the Defendant described in Paragraphs 5, 6 and 7 above constitute unlawful employment practices in violation of Title VII, Section 2000e *et seq.*, of the Civil Rights Act of 1964. As a result thereof, the Plaintiff-Intervenors have been subjected to discrimination because of their sex with respect to conditions and privileges of employment all in violation of said statute. Plaintiff-Intervenors have been and are continuing to be wrongfully deprived of employment and substantial compensation as a direct and proximate result of the unlawful employment practices hereinabove described."

8. Defendant denies the allegations of paragraph 8.

"9. Plaintiff-Intervenors have no other remedy at law, and this suit is their only means of securing adequate relief."

9. The allegation of paragraph 9 is conclusory and requires no answer.

First Affirmative Defense.

1. In the alternative, even if defendant's long-standing policy of requiring the termination of stewardesses' employment upon marriage is in violation of Section 703(a) of the Civil Rights Act of 1964 (78 Stat. 265, 42 U. S. C. § 2000e-2), plaintiffs-intervenors Sandra Moore Ballinger, Sarah A. Boling, Susan Fusco, Judith Hopkins Pendleton and Mary O'Connor Whitmore accepted reinstatement and then either chose not to return or returned to work and then resigned as more fully alleged in paragraphs 2a, b, g, i and m of this answer and, therefore, are not entitled to be reinstated as stewardesses, are not entitled to have all their previous employment privileges and opportunities restored, and are not entitled to any other form of injunctive relief.

Second Affirmative Defense.

1. In the alternative, even if defendant's former policy of requiring the termination of stewardesses' employment upon marriage is in violation of Section 703(a) of the Civil Rights Act of 1964 (78 Stat. 265, 42 U. S. C. § 2000e-2), plaintiff-intervenor Joanne Fitzgerald Hamersley is not entitled to any relief for the reason that she was not terminated pursuant to such policy but rather resigned and did not protest such policy in any manner.

Third Affirmative Defense.

1. In the alternative, even if defendant's former policy of requiring the termination of stewardesses' employment upon marriage is in violation of Section 703(a) of the Civil Rights Act of 1964 (78 Stat. 265, 42 U. S. C. § 2000e-2), plaintiff-intervenor Lynn Mason Raymond is not entitled to any relief for the reason that she did not protest her termination in any manner.

WHEREFORE, defendant prays that the Complaint be dismissed and it be awarded its costs.

UNITED AIR LINES, INC.,
By STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
Its Attorneys.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit
Chicago, Illinois 60604

December 27, 1972.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

CAROLE ANDERSON ROMASANTA and BRENDA BAILES ALTMAN, on behalf of themselves and all others similarly situated,
Plaintiffs,

No. 72-8117 *Misc. vs.*

UNITED AIR LINES, INC., a corporation,
Defendant.

From the United States District Court for the Northern District of Illinois, Eastern Division.

This matter is before the Court on the petition of Plaintiffs for permission to appeal from an order of the U. S. District Court for the Northern District of Illinois, Eastern Division, in No. 70 C 1157, pursuant to the provisions of 28 U. S. C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure, and on the response of Defendant to said petition. On consideration whereof,

IT IS ORDERED that said petition for permission to appeal be and the same is hereby denied.

IN THE UNITED STATES DISTRICT COURT.
* * (Title Omitted in Printing) * *

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

Plaintiffs Rita Ann King, Sandra Beery Hoiles, Carole Elaine Brackle, Sarah Ann Boling and Lynn Mason Raymond, by and through their attorneys, move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter partial summary judgment in their favor by ordering that they be reinstated to their former positions as Stewardesses in the employ of Defendant with all rights of seniority and longevity restored, and in support of their motion state as follows:

1. Defendant's action in terminating the employment of each of the five Plaintiffs herein because they were married constituted unlawful employment discrimination on grounds of sex in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e), as determined by this Court in the companion case of *Sprogis* v. *United Air Lines*, 308 F. Supp. 959 (N. D. Ill. 1970), aff'd. 444 F. 2d 1194 (7th Cir. 1971), cert. den. 404 U. S. 991 (1972).

2. One of the remedies to which each of the five Plaintiffs is entitled by reason of this discrimination is reinstatement to her position as a Stewardess in the employ of Defendant with all her rights of seniority and longevity restored (42 U. S. C. § 2000e-5(g)).

3. There is no genuine issue of material fact with respect to any of the issues raised by this motion.

This motion is based on the facts set forth in the record and in the depositions of each of the five Plaintiffs which have been filed with the Court.

The attached Memorandum is submitted in support of the foregoing Motion.

WHEREFORE, each of the Plaintiffs prays that partial summary judgment be entered in her favor ordering that Defendant reinstate her to employment as a Stewardess with all rights of seniority and longevity restored.

Respectfully submitted,

RICHARD F. WATT,
IRVING M. KING,
PEGGY A. HILLMAN,
By /s/ PEGGY A. HILLMAN,
Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT.
* * (Title Omitted in Printing) * *

JUDGMENT.

This matter coming before the Court upon the motion of plaintiff Rita Ann King for partial summary judgment in her favor seeking reinstatement to her former position as a stewardess in the employ of defendant United Air Lines, Inc., with all rights of seniority and longevity restored, and, upon consideration of the memorandum filed in support of said motion and the stated position of defendant United Air Lines, Inc. not to oppose said motion,

IT IS HEREBY ORDERED that plaintiff Rita Ann King's motion for partial summary judgment is hereby granted and defendant United Air Lines, Inc. is ordered to restore plaintiff Rita Ann King to employment as a stewardess with all her rights of seniority and longevity intact and unimpaired, precisely as they would have accrued but for her discharge on July 9, 1968. This Court retains jurisdiction for the purpose of enforcing this Order and for the purpose of determining any amount of damages owing to plaintiff King.

ENTER:

/s/ J. S. PERRY.

Dated: June 27, 1974.

THE UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

MOTION FOR SUMMARY JUDGMENT.

Plaintiffs Brenda Bailes Altman, Carol Barounes, Marlene Riehl Carney, Susan Fusco, Rita Ann King, Judith Hopkins Pendleton, Terry Baker Van Horn and Mary O'Connor Whitmore, by and through their attorneys, move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judgment in their favor, ordering, adjudging and decreeing as follows:

1. That the rule, regulation or policy of Defendant, United Air Lines, Inc., pursuant to which it discharged all of said plaintiffs is unlawful as in violation of Title VII of the Civil Rights Act of 1964.

2. That, inasmuch as all of said plaintiffs have been offered reinstatement to their positions as stewardesses, each plaintiff is entitled to be compensated for her loss of earnings from the time of her illegal discharge until the date of her reinstatement.

3. That this Court retain jurisdiction for the purpose of enforcing said judgment and of determining the precise amount of compensation to which each plaintiff is entitled.

4. That this Court appoint David J. Shipman as Special Master in Chancery to take testimony and to make a written recommendation for a money decree owing to each of said plaintiffs.

As grounds for this motion, plaintiffs assert that there is no genuine issue as to any material fact which needs to be tried and that plaintiffs are entitled to judgment as prayed for above as a matter of law. In support of their motion, plaintiffs state as follows:

1. Defendant's action in terminating the employment of each of the plaintiffs herein because they were married constituted unlawful employment discrimination on grounds of sex in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e), as determined by this Court in the companion case of *Sprogis* v. *United Air Lines, Inc.*, 308 F. Supp. 959 (N. D. Ill. 1970), aff'd. 444 F. 2d 1194 (7th Cir. 1971), cert. den. 404 U. S. 991 (1972).

2. One of the remedies to which each plaintiff is entitled by reason of this discrimination is compensation for earnings lost from the time of each illegal discharge until the date of reinstatement (42 U. S. C. § 2000e-5(g)).

This motion is based on the facts set forth in the record and in the deposition of each of the plaintiffs (with the exception of plaintiff Barounes) which have been filed with the Court.

WHEREFORE, each of the plaintiffs pray that summary judgment be entered in her favor in accordance with this motion.

RICHARD F. WATT
IRVING M. KING
PEGGY A. HILLMAN
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

DECREE.

This matter coming before the Court on the motion for summary judgment filed on behalf of Plaintiffs Brenda Bailes Altman, Carol Barounes, Marlene Riehl Carney, Susan Fusco, Rita Ann King, Judith Hopkins Pendleton, Terry Baker Van Horn and Mary O'Connor Whitmore and the Court having considered all matters of record and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiffs' motion for summary judgment is hereby granted;

2. The discharges of all said Plaintiffs by the Defendant pursuant to a policy requiring that all Stewardesses be unmarried when hired and remain unmarried while so employed constitute unlawful sex discrimination as in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e, et seq.).

3. Inasmuch as all of said Plaintiffs have been offered reinstatement to their positions as stewardesses, each Plaintiff is entitled to be compensated for her loss of earnings pursuant to the provisions of Title VII of the Civil Rights Act of 1964.

4. Since the record does not disclose the amount of compensation lost by said Plaintiffs, the Court should and hereby does retain jurisdiction for the purpose of enforcing this Order and for the purpose of determining by appropriate proceedings, the precise amount of compensation to which each Plaintiff is entitled.

5. The Court hereby appoints David J. Shipman as Special Master in Chancery to take testimony and make a recommendation for a money decree owing to each of said plaintiffs. Said

Special Master's fees shall be fixed by the Court and said fees and his costs shall be assessed as costs herein. The Court does now order that said Special Master in Chancery shall have the power to administer oaths, issue subpoenas duces tecum and shall have the power to order documents produced by either of the parties. The Court further orders that said Special Master shall conduct and supervise all discovery proceedings, shall rule upon all motions concerning discovery, and shall order the taking of depositions or quashing of notices and rule on other routine and contested matters concerning discovery. The Court does not intend that said Special Master in Chancery shall be consulted on the routine taking of depositions, where there is no controversy between the parties. Said Special Master shall report progress herein to the Court within ninety (90) days after this judgment order becomes final by virtue of no appeal being taken within the time for appeal or after a mandate of affirmance in the event of appeal.

6. The Court also retains jurisdiction for the purpose of hearing applications for attorneys' fees and any issues as to costs.

ENTER:

/s/ J. S. PERRY

Dated: Chicago, Illinois, July 2, 1974.

UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

ORDER.

This matter coming before the Court for the entry of a final order and the Court being fully advised of all relevant circumstances, the Court finds as follows:

A. This lawsuit was filed in 1970 as a class action on behalf of all United Air Lines, Inc. stewardesses who were discharged on account of marriage, alleging that their discharges constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e *et seq.*). In a memorandum opinion dated December 6, 1972, this Court ordered that the class action allegations of the complaint be stricken and that certain persons be allowed to intervene as Plaintiffs. In addition to the named Plaintiffs, Carole Anderson Romasanta and Brenda Bailes Altman, intervention was granted for Plaintiffs Sandra Moore Ballinger Hoiles, Sarah A. Boling, Carol Elaine Brackle, Catherine Reese Colvin, Susan Fusco, Judith Hopkins Pendleton, Terry Baker Van Horn, Mary O'Connor Whitmore, Marlene Riehl Carney, Rita Gardino Trubshaw King, Lynn Mason Raymond and Joanne Fitzgerald Hamersley. The Court denied the motions to intervene of Elizabeth Glenn Ashworth, Bernadette Dixon, Barbara A. Klocek, Gloria Lala, Patricia M. Moon, Janice Schmidt Rensch, Jeanette Byers Schlau and Evelyn A. Ambrose, on the ground that these individuals accepted reinstatement in full satisfaction of their grievances. The Court also denied the motions to intervene of Mary Weis, Helen Read Gunst, Diane M. Welty and Doris Rivas Collins on the ground that these individuals had similar actions pending elsewhere. Subsequently, on April 25, 1973, this Court granted the motion to intervene of Carol Paglia Barounes.

B. After this Court's rulings in the companion case entitled *Sprogis* v. *United Air Lines, Inc.*, Case No. 68 C 2311, holding that Defendant United Air Lines, Inc. had violated Title VII

of the Civil Rights Act of 1964 when it discharged Plaintiff Sprogis on account of her marriage (308 F. Supp. 959 (N. D. Ill. 1970), aff'd. 444 F. 2d 1194 (7th Cir. 1971), cert. den. 404 U. S. 991 (1971)) and subsequently affirming the recommendation of Special Master David Shipman as to the amount of damages which Plaintiff Sprogis was entitled to recover from Defendant United Air Lines (memorandum opinion of June 10, 1974, aff'd. 517 F. 2d 387 (7th Cir. 1975), counsel for the parties in this case negotiated settlements of the claims of Plaintiffs Susan Fusco, Mary Whitmore, Rita King, Marlene Carney, Carol Barounes, Judith Pendleton, Terry Van Horn, Brenda Bailes Altman, Carol Elaine Brackle, Sandra Hoiles, Carole Romasanta and Joanne Hamersley. In such negotiations the rulings of this Court in *Sprogis* with respect to back pay were applied. In particular, in their negotiations, counsel in good faith applied this Court's ruling in *Sprogis* with respect to the following:

a. As to any Plaintiff who had not been reinstated to her former position as Stewardess, the parties commenced their negotiations by deciding her right to reinstatement;

b. Each Plaintiff's entitlement to back pay was based upon the monthly base-pay rate for stewardesses in the relevant collective bargaining agreement, plus ten hours of overtime pay per month;

c. Computations of each Plaintiff's maximum entitlement to back pay were made by computing the back pay from the date of each Plaintiff's discharge to the date of her reinstatement, deducting all interim earnings;

d. As to any Plaintiff who was pregnant during the claim period, back pay was deducted for an eight-month period of pregnancy.

e. Appropriate consideration was given by the parties to the question of whether each Plaintiff sought interim employment with reasonable diligence; and

f. Each Plaintiff except Carole Romasanta recovered interest on the agreed back pay award, computed on a quarterly earnings basis at the rate of six per cent per annum.

C. The parties were unable to reach agreement with respect to two of the Plaintiffs and with respect to these two Plaintiffs the Court issued the following orders:

a. On July 3, 1975, this Court ordered the reinstatement of Plaintiff Sarah Ann Boling with 7½ years of seniority and without any back pay or other compensation.

b. On August 5, 1975, this Court granted Defendant United Air Lines' motion to dismiss the complaint as to Plaintiff Lynn Mason Raymond.

D. Plaintiff Catherine Reese Colvin has moved for leave to withdraw as a Plaintiff in this action, and to waive any claim to relief herein.

E. All matters affecting the claims of each of the 15 Plaintiffs relating to reinstatement and back pay have now been resolved. The only issue remaining concerns the propriety of an award of attorneys' fees and costs pursuant to Section 706(k) of the Civil Rights Act of 1964 as amended (42 U. S. C. § 2000e-5(k)).

IT IS THEREFORE ORDERED:

1. That the complaints of Plaintiffs Susan Fusco, Mary Witmore, Rita King, Marlene Carney, Carol Barounes, Judith Pendleton, Terry Van Horn, Brenda Bailes Altman, Carol Elaine Brackle, Sandra Hoiles, Carole Romasanta and Joanne Hamersley are hereby dismissed with prejudice, all matters in controversy with respect to such claims having been settled and resolved.

2. That the complaint of Plaintiff Catherine Reese Colvin is dismissed with prejudice.

3. That the Court expressly reserves jurisdiction for the purpose of considering an application for attorneys' fees and costs, which application Plaintiffs' counsel shall file within twenty days hereof.

ENTER:

/s/ J. S. PERRY

Judge

Dated: October 3, 1975

IN THE UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

PETITION TO INTERVENE FOR PURPOSES OF TAKING AN APPEAL.

Petitioner Liane Buix McDonald, by her attorney, hereby petitions, pursuant to Rules 24(a) and (b) of Federal Rules of Civil Procedure, for leave to intervene in this matter for purposes of taking an appeal from this Court's final order and judgment of October 3, 1975.

In support of this motion, petitioner states as follows:

1. This action was originally brought on a class basis on behalf of all persons employed as stewardesses by United Air Lines, Inc. who were discharged by United pursuant to its no-marriage policy between the dates of July 2, 1965 and November 7, 1968. Petitioner McDonald, as is set forth in her affidavit attached hereto and made a part of this petition, was discharged by defendant United from a position as a stewardess pursuant to this policy in September 1968.

2. By its memorandum and order of December 6, 1972, this Court struck the class action allegations and thereby excluded from this action all persons who had been discharged as stewardesses by defendant pursuant to its no-marriage policy and who had not filed a grievance under the applicable collective bargaining agreement or a complaint with the Equal Employment Opportunity Commission or similar state agency.

3. As is more fully set forth in the attached affidavit, petitioner McDonald was among the class of persons thereby excluded from this action.

4. Pursuant to certification by this Court, the named plaintiffs on December 18, 1972 sought leave from the United States Court of Appeals for the Seventh Circuit to take an interlocutory appeal from this Court's decision and order of December 6,

1972. Among the issues sought to be raised on this appeal was this Court's ruling striking the class action allegations and excluding from this action persons similarly situated to petitioner. By order of December 27, 1972, the United States Court of Appeals for the Seventh Circuit denied plaintiffs leave to take such an interlocutory appeal. Thus the denial of class status to persons excluded by this Court's December 6, 1972 order has not yet been the subject of appellate court review.

5. On October 3, 1975, this Court entered a final order and judgment in this action. Petitioner has since been informed, as is more fully set forth in the attached affidavit, that the named plaintiffs do not intend to prosecute an appeal to seek review of this Court's rulings regarding class status and exclusion.

6. Petitioner desires to prosecute an appeal to the United States Court of Appeals for the Seventh Circuit regarding this Court's rulings regarding the exclusion of petitioner and all persons similarly situated from participation in this cause.

7. Attached hereto, as required by Federal Rule of Civil Procedure 24(c), is a copy of the pleading which she will file if leave is granted: a notice of appeal to the United States Court of Appeals for the Seventh Circuit regarding these matters.

8. In support of this petition, petitioner submits her affidavit, which is attached and made a part hereof.

WHEREFORE, petitioner prays that:

A. This petition for leave to intervene be granted.

B. An appearance by counsel on petitioner's behalf and all members of the plaintiff class be entered, and

C. The notice of appeal in the form attached be filed.

/s/ THOMAS R. MEITES
Attorney for Petitioner

AFFIDAVIT OF LIANE BUIX McDONALD.

Liane Buix McDonald, on oath, deposes and states as follows:

1. I am the petitioner in the Petition to Intervene in *Romasanta, et al.* v. *United Air Lines, Inc.*, No. 70 C 1157, in support of which this affidavit is submitted.

2. On March 24, 1965, I began employment as a stewardess with United Air Lines, Inc. I served continuously in that position until September 17 or 18, 1968, when I was discharged by United under its no-marriage policy.

3. At the time of discharge or soon thereafter, I learned that other former United Air Lines stewardesses who had been discharged pursuant to the same policy were prosecuting grievances under the collective bargaining machinery or had filed charges of discrimination with state and federal agencies. Since the legality of the no-marriage policy was being challenged in proceedings that I thought would govern my situation, I did not myself file a discrimination charge against United or grievance under the collective bargaining agreement.

4. On October 8, 1975 I learned that this Court on October 3, 1975 had entered an order finally disposing of this case. I had previously been informed that during the course of this lawsuit, the Court had struck the class action allegations and so excluded me and others like me from this action and that an attempt to appeal this ruling had not been successful.

5. On October 8, 1975, I was also informed that it was unlikely that the named plaintiffs would seek to appeal to challenge the Court's rulings regarding class status and exclusion. On October 17, 1975, I was informed that in fact no such appeal would be taken.

/s/ LIANE BUIX McDONALD
Liane Buix McDonald

Subscribed and sworn to before me this 17th day of October, 1975.

/s/ THOMAS R. MEITES
Notary Public

IN THE UNITED STATES DISTRICT COUKT.

* * (Title Omitted in Printing) * *

NOTICE OF APPEAL.

Notice is hereby given that intervenor Liane Buix McDonald on behalf of herself and all other persons similarly situated hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final order and judgment entered herein on October 3, 1975 and in particular, but not by way of limitation, from all orders entered herein denying or otherwise effecting maintenance of this cause as a class action and excluding appellant and all other persons similarly situated from this action.

THOMAS R. MEITES
Attorney for Intervenor

IN THE UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

TRANSCRIPT OF PROCEEDINGS.

had at the hearing of the above-entitled cause before The Honorable J. Sam Perry, Senior Judge of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Tuesday, October 21, 1975, at the hour of 10:00 a.m.
Present:

Messrs. Cotton, Watt, Jones, King & Bowlus (One IBM Plaza, Room 4750, Chicago, Illinois 60611) by Mr. Richard F. Watt appeared for plaintiffs;

Messrs. Mayer, Brown & Platt (231 South LaSalle Street, 19th Floor, Chicago, Illinois 60604) by Mr. James W. Gladden, Jr., appeared for defendant;

Mr. Thomas R. Meites (33 North Dearborn Street, Room 2424, Chicago, Illinois) appeared for petitioner.

[2] (The Court gave attention to other matters on the call, after which the following further proceedings were had herein:)

The Clerk: No. 70 C 1157, Romasanta v. United Air Lines, petition to intervene for purposes of taking an appeal.

Mr. Meites: Good morning, your Honor.

The Court: Good morning.

Mr. Meites: My name is Thomas R. Meites, and I represent the petitioner this morning, Lee Ann McDonald.

This is a petition by Mrs. McDonald to appeal the final order and judgment your Honor entered in this case on October 3, 1975. If I may, let me give you some background on why we are here. As the attached affidavit indicates, Mrs. McDonald was a former United Air Lines stewardess who was discharged by United pursuant to its no-marriage policy. Romasanta, the case I seek to intervene in, was brought as a class action in

1970, and in 1972, as your Honor will recall, you struck the class action allegations on the motion of defendants, and in that same order you granted a certificate to plaintiffs to seek to go to the Seventh Circuit to try to get review of your class action ruling. The Seventh Circuit unfortunately chose not to [3] grant leave to take that appeal. To this day Mrs. McDonald was excluded from this action by your ruling. She was one of those stewardesses who was out of the case because of your December, 1972 ruling. Now, because the Seventh Circuit would not grant an interlocutory appeal to this day, your order has not been challenged.

With your ruling on October 3, the case is dismissed, the class action ruling is now a final order and appealable of right. However, the named plaintiffs in this case represented by Mr. Watt have informed us that they do not intend to seek an appeal. Since no one is going to appeal for Mrs. McDonald and the other stewardesses who were excluded by your December, 1972 ruling, at this time we seek to intervene so that we can take that appeal to the Seventh Circuit.

Mr. Gladden: Your Honor, James Gladden representing United Air Lines.

We oppose the motion to intervene. We think it is completely untimely. This is somewhat three years after the class action ruling was made by your Honor. In fact, under Rule 59(e) any motion to alter or amend judgment has to be served not later than ten days after the entry of the judgment. This was not served until at least two weeks after the entry of the judgment, and under the Rules it is not a timely motion because it [4] is a motion to amend the judgment because you are seeking to add a party.

Secondly, to be allowed to intervene there has to be a timely motion, and I think this motion is completely untimely. Your Honor recognizes how much effort and time has gone into trying to resolve this matter, settling with these various people who intervened. If Mrs. McDonald had a claim which she felt should

be prosecuted, when your Honor denied class action she had a full right to go into Court, bring her own action, and pursue it at that point. She chose not to do this. She sits and waits for another two and a half years, and now after this case is all wrapped up and final judgment is entered she now comes in and seeks to intervene as a plaintiff. She did not even seek to intervene as a plaintiff in this case at an earlier point, prior to the settlements which were worked out with each of these individual people. It just seems to me it is totally untimely and should be denied under both, treated as a motion to alter the judgment and treated as a petition to intervene.

Mr. Meites: Judge, can I respond just briefly to those remarks.

I think that Mr. Gladden's suggestion that we should have acted sooner is a little bit of a red [5] herring. Until we found out on Friday that Mr. Watt's clients were not going to appeal, we had every reason to expect that the class action matter which they sought to go up on once would be pursued on appeal. Now, I believe the cases hold contrary to what Mr. Gladden has suggested, that timeliness under Rule 24, petition to intervene, is determined when the right matures. Until you entered your final judgment on October 3, 1975 it was impossible for us or anyone else to appeal your class action ruling.

Let me call your attention to what I think is a case which is pretty much on point in this, a case called Pellegrino v. Nesbitt. It is a Ninth Circuit case. It says that intervention should be allowed even after final judgment when it is necessary to preserve some right that otherwise would be lost.

As I stand here today, if we are not granted this petition for leave to intervene our rights under the Romasanta case and our rights to appeal will be ended forever. The Seventh Circuit will never have a chance to test the correctness of your 1972 ruling, and Mrs. McDonald and the other stewardesses similiarly situated will forever be foreclosed from the same kind of relief that you held warranted as to the other stewardesses.

Now, you held she was in a different [6] situation than the other stewardesses.

The Court: Well, why didn't she come in here and individually seek?

Mr. Watt: You Honor, could I be heard briefly on this?

The Court: Yes.

Mr. Watt: From our standpoint, since we have settled with United Air Lines the claims of all the individual stewardesses who were permitted to intervene, we really are neutral so far as the motion is concerned, but I think as a matter of clarifying the record we should go back to the time when your Honor denied the class action status and struck the class action.

The Court: Well, I allowed everybody to come in individually that wanted to.

Mr. Watt: No, your Honor, I do not think that is quite correct. What you ruled was that you would entertain petitions for leave to intervene on behalf of those who had either filed a grievance or had gone to the EEOC or to an equivalent state agency. That excluded a number of the individuals, including the party who is now seeking to intervene.

The Court: She never even sought to appeal that order. She never sought to come in at any time and ask for a modification.

[7] Mr. Watt: No, we did seek to appeal that order, your Honor, on behalf of the class representatives who were Carole Romasanta and Brenda Altman. Your Honor certified that question under 1292(b). We took the matter to the Court of Appeals and the Court of Appeals declined to hear the class action issue at that time, so that I do not think anyone could have sought to have that issued reviewed prior to the present time. Now, we could on behalf of the class action representatives at the present time, I believe, file a notice of appeal from that original ruling with respect to the class action allegations, but our plaintiffs have chosen not to do so. They have settled their

individual claims, and consequently the original class action representatives are not in a position to take the appeal. For that reason I think there may be others who are affected by the ruling who may have standing and right to seek to appeal, and that is the purpose, as I understand it, of Mr. Meites' petition.

The Court: Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek any relief from this Court in any way during that period of time, and litigation must end. I must deny this motion. Of course, that is an appealable order itself, [8] and if I am in error then the Court of Appeals can reverse me and we will grant a hearing, but in my judgment this is too late to come in.

Mr. Meites: Thank you, your Honor.

Mr. Gladden: Thank you.

(Which were all of the proceedings had in the above-entitled cause on the day and date aforesaid.)

UNITED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Joseph Sam Perry

Cause No. 70 C 1157 Date October 21, 1975

Title of Cause—Carole Romasanta et al. v. United Air Lines, Inc.

Brief Statement of Motion—Petition of Liane Buix McDonald to Intervene for Purposes of Taking an Appeal is hereby denied.

Names and Addresses of moving counsel—Thomas R. Meites, 33 N. Dearborn, Suite 920, Chicago, Ill. 60602, attorney for petitioner.

Names and Addresses of other counsel entitled to notice and names of parties they represent.—James Gladden, Jr., Mayer, Brown & Platt, 231 S. LaSalle, Chicago, Ill. 60604, attorney for defendant; Richard Watt, Cotton, Watt, Jones, King & Bowlus, One IBM Plaza, Suite 4750, Chicago, Ill. 60611, attorneys for plaintiffs.

Enter Order.

Perry

Oct. 21, 1975

IN THE UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

NOTICE OF APPEAL.

Notice is hereby given that petitioner Liane Buix McDonald on behalf of herself and all other persons similarly situated hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final order entered herein on October 21, 1975 denying petitioner's Petition to Intervene.

/s/ THOMAS R. MEITES
Attorney for petitioner

IN THE UNITED STATES DISTRICT COURT.

* * (Title Omitted in Printing) * *

NOTICE OF APPEAL.

Notice is hereby given that petitioner Liane Buix McDonald on behalf of herself and all other persons similarly situated hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final order and judgment entered herein on October 3, 1975 and in particular, but not by way of limitation, from all orders entered herein denying or otherwise effecting maintenance of this cause as a class action and excluding appellant and all other persons similarly situated from this action.

/s/ THOMAS R. MEITES
Attorney for petitioner

IN THE UNITED STATES COURT OF APPEALS,
for the Seventh Circuit.

No. 75-2063

CAROLE ANDERSON ROMASANTA, ET AL.,
Plaintiffs,

vs.

UNITED AIR LINES, INC., a corporation,
Defendant-Appellee,

LIANE BUIX MCDONALD, on her own behalf and on behalf of others similarly situated,
Petitioning Intervenor-Appellant.

Appeal from the United States District Court.
for the Northern District of Illinois,
Eastern Division No. 70 C 1157.
J. SAM PERRY, *Judge.*

ARGUED FEBRUARY 17, 1976—DECIDED JULY 1, 1976

Before FAIRCHILD, *Chief Judge,* CUMMINGS and PELL, *Circuit Judges.*

PER CURIAM. This case is related to *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), certiorari denied, 404 U. S. 991 where we held that United's policy of refusing to employ married stewardesses was discrimination based on sex in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § § 2000e-2(a)(1). During the pendency of the *Sprogis* appeal, Carole Romasanta[1] filed the

1. Brenda Bailes Altman was added as a plaintiff on October 9, 1970.

present suit on behalf of herself and other United stewardesses who were similarly discharged. Appellant Liane McDonald ("petitioner") was a member of the putative class in *Romasanta.*

On December 6, 1972, while defendant was still denying liability, the district court filed a memorandum opinion and order that this case should not proceed as a class action. However, the court permitted twelve former stewardesses to intervene "by way of joinder as additional parties plaintiff" since they had protested defendant's no-marriage rule by filing a grievance under the collective bargaining contract or by complaint to the Equal Employment Opportunity Commission or a comparable state agency. Petitioner and 140 other stewardesses[2] were thus excluded from the case.

On July 3, 1974, the district court granted the plaintiffs' motion for summary judgment and appointed a special master to recommend the compensation for each plaintiff. On October 3, 1975, the court issued a final order incorporating a settlement providing for reinstatement and back pay awards to the plaintiffs herein. In this order, the court only reserved jurisdiction to consider attorney's fees and costs.

Five days after the October 3, 1975, order terminating the litigation, petitioner first learned that the plaintiffs herein would probably not appeal the adverse class determination, and on October 17th she learned that there would definitely be no appeal. Consequently, on October 21st, she petitioned to intervene in order to file a notice of appeal with respect to the district court's final order of October 3, 1975, insofar as it reiterated striking the class action allegations from the complaint.[3] On

2. The figure is derived from p. 2 of petitioner's main brief and p. 13 of the EEOC's brief and may be excessive. Defendant asserts there are only 30 in this class (defendant's main brief 50).

3. On December 27, 1972, we refused to grant leave to appeal from the district court's December 6, 1972 interlocutory order striking the class allegations, so that an appeal first became appropriate after the district court's final order of October 3, 1975. The denial of the class allegations was not appealable earlier. *Anschul* v. *Sitmar Cruises, Inc.*, ... F. 2d ..... (7th Cir. No. 74-1908, decided May 17, 1976).

October 23rd, petitioner filed a notice of appeal from the October 21st order denying her petition to intervene and also filed a notice of appeal from the October 3, 1975, order insofar as the district judge had refused to permit the cause to proceed as a class action. Because the district court erred in denying the motion to intervene and in refusing to certify a class, we reverse and remand.

Whether the petitioner should have been permitted to intervene is governed by Rule 24 of the Federal Rules of Civil Procedure. In pertinent part, Rule 24(b)(2) provides:

> "(b) *Permissive intervention.* Upon timely application anyone shall be permitted to intervene in an aticon:
>
> * * * * *
>
> "(2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Defendant's primary contention is that the motion to intervene was not timely. The Supreme Court has held: "Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP* v. *New York*, 413 U. S. 345, 366. Among the relevant factors are the stage of the litigation at which the intervention is sought, the interests of the intervenors, the purposes of the statute under which the suit is brought and the relative harm to the parties. *NAACP* v. *New York, supra*, 413 U. S. at 366-369; *EEOC* v. *United Air Lines, Inc.*, 515 F. 2d 946, 949 (7th Cir. 1975). Defendant argues that the motion to intervene would have been timely only if it was made immediatcly after the court refused to certify a class. We disagree.

In our view, petitioner's application was timely within the rule because she was not advised until October 17th that the

plaintiffs would not appeal from Judge Perry's final order.[4] Plaintiffs' previous attempt to appeal from Judge Perry's interlocutory order denying class status, although unsuccessful (see note 3, *supra*), indicated that they would be willing to pursue the question after final judgment. Petitioner could reasonably rely on this representation and therefore her delay in filing the motion to intervene was excusable. See *Jimenez* v. *Weinberger*, 523 F. 2d 689, 695-697 (7th Cir. 1975); *Hodgson* v. *United Mine Workers*, 473 F. 2d 118, 130 (D. C. Cir. 1972).

Our holding is consistent with the purposes of Title VII. Because the Civil Rights Act of 1964 attacks class-based discrimination, it is particularly appropriate that suits to remedy violations of the Act be brought as class actions. See *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 717, 619-720 (7th Cir. 1969). The relief sought in these suits to establish equality, not only between the group discriminated against and other groups but also among the members of the victimized group. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417-421; *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F. 2d at 719-720; *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 498 (5th Cir. 1968). The primary burden of enforcing Title VII rests with private plaintiffs. *Air Line Stewards & Stewardesses Ass'n.* v. *American Air Lines*, 455 F. 2d 101, 108 (7th Cir. 1972); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 32 (5th Cir. 1968).[5] Because of the statutory reliance on private enforcement, the courts have suspended the requirement that each victim of discrimination file a complaint with the EEOC once one member of the class has

4. *EEOC* v. *United Air Lines, Inc., supra*, is not to the contrary, for there representation of the intervenor's interest by existing parties was adequate when intervention was sought. Intervention was sought here as soon as it was apparent that plaintiffs would not appeal the final order denying class status.

5. Because the Voting Rights Act in force at the time of the suit did not authorize a private action, *NAACP* v. *New York, supra*, relied upon by defendants is distinguishable. Further, in *NAACP* there was no support for the claim that the representation of the intervenor's interests by the United States was inadequate. 413 U. S. at 368.

filed the protest. *Dodge* v. *Giant Food, Inc.*, 448 F. 2d 1333 (D. C. Cir. 1973); *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F. 2d at 720; *Oatis* v. *Crown Zellerbach Corp., supra.*[6] That logic also compels the conclusion here that in court, as well as before the agency, the members may rely on the champion of the class until he or she abdicates. In this case we believe that abdication occurred when plaintiffs decided not to appeal the adverse class action determination. To hold otherwise would permit one member of the class to obtain benefits greater than other members.[7] This disparity would result, not from petitioner's lack of assertiveness, but from the district court's erroneous ruling on the class action question. This result would be inconsistent with Title VII's goal to establish equality among members of the aggrieved class.

Finally, intervention would not prejudice the adjudication of the rights of the original parties, for defendant knew of the potential liability to this class since the commencement of the class action, and until October 17th defendant could reasonably expect this liability to be enforced through an appeal of the adverse class ruling. *Jimenez* v. *Weinberger, supra*, 523 F. 2d at 701.

The other requirements of Rule 24(b)(2) have also been met. Petitioner's claim and the main action had questions of law

6. See also *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 551. The specific holding in *American Pipe* that the statute of limitations is tolled only during the pendency of the motion to certify a class and begins to run anew if the motion is denied is not applicable here. The statute of limitations in Title VII actions is suspended once one member of the class initiates the grievance mechanism. See *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F. 2d at 720.

7. The plaintiffs and the petitioner must be considered to be members of the same class. Any distinction between them such as the filing of an EEOC or state agency complaint or a grievance with the union is not significant. Once a timely administrative complaint has been filed by one stewardess, all others who were discharged by operation of the rule are entitled to recover. Similarly, the filing of a union grievance cannot be made a precondition of recovery. *Albemarle Paper Co.* v. *Moody, supra*, 422 U. S. at 414, n. 8.

in common, namely, the correctness of the striking of the class allegations and the remedy for the illegal no-marriage rule as applied to petitioner's class. The petition to intervene was not governed by the ten-day provision of Rule 59(e) of the Federal Rules of Procedure, for petitioner's motion did not ask the district court "to alter or amend the judgment" but was for purposes of taking an appeal from the final judgment. It is entirely proper then to permit putative class members here to intervene for the purpose of pursuing an appeal of the adverse class action determination. *Black* v. *Central Motor Lines, Inc.*, 500 F. 2d 407, 408 (4th Cir. 1974); *Smuck* v. *Hobson*, 408 F. 2d 175, 177-182 (D. C. Cir. 1969) (en banc).

Because petitioner was entitled to be an intervenor and filed a timely notice of appeal from the final order terminating the litigation, we have power to examine the adverse class ruling and accordingly deny defendant's motion to strike that notice of appeal and to dismiss that appeal.

In this case, the district court judge refused to certify the class because the putative members had failed to show an interest in reemployment either by filing a grievance with the union or a complaint with the EEOC. It is well established, however, that the filing of a charge with the EEOC is not a prerequisite to recovery as a member of an injured class where one member of the class has done so. *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F. 2d at 720. Nor do we believe that each member of the class can be required to exhaust other remedies before recovering. See *Albemarle Paper Co.* v. *Moody, supra*, 422 U. S. at 414, n. 8. The district court's order denying class action status must therefore be reversed.

In *Bowe* v. *Colgate-Palmolive Co., supra*, we stressed the appropriateness of a class action in a Title VII case. See also *Air Line Stewards & Stewardesses Ass'n* v. *American Airlines, Inc.*, 490 F. 2d 636, 643 (7th Cir. 1973), certiorari denied, 416 U. S. 993. On remand, the district court must comply with our ruling in *Bowe* that "relief should be made available to

all who were so damaged, whether or not they filed [EEOC or comparable state agency] charges and whether or not they joined in the suit." 416 F. 2d at 721. As stated in *Oatis* v. *Crown Zellerbach Corporation*, 398 F. 2d 496, 498 (5th Cir. 1968), "It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC." As petitioner has explained in her affidavit supporting her petition to intervene, she knew that other former United Air Lines' stewardesses, were challenging the no-marriage policy and therefore did not file a discrimination charge against United or a grievance under the collective bargaining agreement. We conclude that the women in petitioner's class are entitled to participate in this case under *Bowe* unless they choose to opt out under Rule 23(c)(2) of the Federal Rules of Civil Procedure.[8]

The district court's orders of October 3 and 21, 1973, are reversed with instructions to permit petitioner to intervene on her own behalf and on behalf of her class, to treat the case as an action by her class, and to fashion relief for her class.

PELL, *Circuit Judge*, dissenting. The Romasanta suit out of which the present issue arose required five years for a resolution to be reached. When that suit reached a critical point insofar as petitioner's interests were concerned more than three years ago, it in my opinion was incumbent upon her then to take immediate affirmative steps to protect her interests if she wanted to take advantage of this lawsuit as a forum for her claims.

In my opinion Judge Perry clearly acted properly when he denied the motion to intervene as untimely:

> THE COURT: Well, in my judgment, gentlemen, this, is five years now this has been in litigation, and this lady has not seen fit to come in here and seek relief from this Court in any way during that period of time, and litigation must end. I must deny this motion. Of course, this is an appealable order itself, and if I am in error then the Court of Appeals can reverse me and we will grant a hearing, but in my judgment this is too late to come in.

8. This opinion does not preclude the defendant from mitigating liability or rebutting the damage claim of some members of petitioner's class. *Sprogis* v. *United Air Lines, Inc.*, 517 F. 2d 387, 392 (7th Cir. 1975).

Since I agree with Judge Perry and disagree with the majority finding that Judge Perry abused his discretion, I respectfully dissent.

Questions of timeliness are peculiarly appropriate for determination by the trial court, and it is for that reason that the appropriate standard for review is to determine whether there has been an abuse of discretion. The United States Supreme Court, in *NAACP* v. *New York*, 413 U. S. 345 (1973), in affirming the lower court's denial of a motion to intervene on the basis of timeliness, set forth the standard by which this Court must review Judge Perry's ruling as follows (413 U. S. at 365-66):

> Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b) that the application must be "timely." If it is untimely, intervention must be denied. Thus the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion: unless that discretion is abused, the court's ruling will not be disturbed on review. (Footnotes omitted.)

This same standard has consistently been applied in cases involving Title VII of the Civil Rights Act *E.g.*, *EEOC* v. *United Air Lines, Inc.*, 515 F. 2d 946 (7th Cir. 1975); *Black* v. *Central Motor Lines, Inc.*, 500 F. 2d 407 (4th Cir. 1974).

In *NAACP*, the Supreme Court upheld the district court's determination that the motion to intervene was untimely, even though it was filed only seventeen days after the would-be

intervenors allegedly became aware of the suit, stating that "it was incumbent upon the appellants, at that stage of the proceedings, [a critical stage] to take immediate affirmative steps to protect their interests. . . ." 413 U. S. at 367.

In *EEOC*, *supra*, this court denied a motion to intervene as untimely in a situation much less extreme than the instant case. A pattern and practice suit was brought in April 1973, under Title VII of the Civil Rights Act, alleging discrimination against black and female employees of United Air Lines. The complaint was amended in February 1974 to include allegations of discrimination against Spanish-surnamed and Asian-American employees. When two organizations representing these latter groups attempted to intervene in July 1975, this Court affirmed the denial of intervention as untimely, even though the trial had not yet begun, because the intervenors had offered no excuse for waiting *5 months* after the complaint was amended and their interest in the action first created. See also *SEC* v. *Bloomberg*, 299 F. 2d 315 (1st Cir. 1962); *Hoots* v. *Pennsylvania*, 495 F. 2d 1095, 1097 (3d Cir. 1974), *cert. denied*, 419 U. S. 884; and *Westward Coach Manufacturing Company, Inc.* v. *Ford Motor Co.*, 388 F. 2d 627, 635 (7th Cir. 1968) *cert. denied*, 392 U. S. 927.

In a class action situation, the determination of when intervention is first appropriate relates to the question of adequacy of representation. In a true class action, it is unnecessary for an unnamed class member to intervene as long as his interests are being protected by his class representatives. In *Alleghany Corporation* v. *Kirby*, 344 F. 2d 571 (2d Cir. 1965); *cert. granted*, 381 U. S. 933, *cert. dismissed as improvidently granted*, 384 U. S. 28 (1966), where the Second Circuit denied a "last-minute" attempt at intervention by shareholders in a derivative suit to set aside a settlement on behalf of their corporation, the court explained the connection between timeliness and adequate representation (344 F. 2d at 574):

> As we see it, the timeliness requirement, specifically articulated in Rule 24(a), is related to the question whether the shareholders' interests are or may be inadequately represented, for whether an application to intervene is prompt or tardy also turns on when the interests of the proposed intervenors were no longer properly represented.

When petitioner's application for intervention is viewed in the light of these cases, it appears clear to me that the motion was untimely. Petitioner admits knowledge of the class action denial in Romasanta in 1972 and yet offers no persuasive reason for her failure to petition to intervene then. Once the class was denied, and the suit proceeded as an individual action, she had no reason to believe her interests were being represented or protected by others. This was particularly true since the class action denial had the effect of excluding from the case all those who, like petitioner, had not protested the no-marriage rule. There was no longer anyone similarly situated to petitioner in the case.

Petitioner admits knowledge of the course of the *Sprogis* (or related) litigation from the very start (*i.e.*, September 1968, the time of her alleged discharge). Yet she made no attempt to intervene in *Sprogis* to appeal from the denial of class action in 1972 or from the final order in 1974.[1]

But instead, petitioner, with claimed knowledge of the pending lawsuits concerning the no-marriage rule, did nothing and wanted seven years to identify herself as one who sought relief. Petitioner now wants to start this case all over again—three years after Romasanta was declared not to be a class action, after many others were permitted to intervene, and after extensive negotiations in which the parties were finally able to resolve the issues in this case.

Consistent with petitioner's unhurried conduct is the fact that her motion to intervene violates the only procedural rule under

1. Petitioner argues that she relied upon the parties in Romasanta to appeal the class action decision. But ALPA, the party responsible for bringing both the *Sprogis* and Romasanta actions, did not appeal the class denial in *Sprogis* (nor did anyone else), so there appears to be no reason for petitioner's reliance on the same parties' appealing the class decision in Romasanta.

which her motion can be brought, *i.e.*, Fed. R. Civ. P. 59(e), Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Petitioner's motion to intervene was clearly a motion to alter or amend the judgment to add an additional party. It was served on October 17 and heard on October 21, 1975, all well beyond ten days after the entry of the final order on October 3.

It is important to note that had she sought intervention immediately after the denial of class status, and her intervention had been denied, the intervention issue would have been before this court three years ago. Furthermore, assuming that her intervention had been denied because of petitioner's failure to protest the no-marriage rule—the requirement which was the basis of the court's holding that this action lacked the requisite numerosity to proceed as a class action—then *that* issue would have been before this court and decided three years ago. Instead, petitioner chose to sit back and allow others to assume the costs and risks in prosecuting their individual actions, and now she attempts to revive her dead claim through another suit which after years of legal argument and negotiation was finally settled to the satisfaction of all parties.

When a class action is denied, former putative class members may not ignore this fact and continue on the assumption the suit is a class action ("spurious" or otherwise), as does petitioner. The denial of class status is a critical point which puts putative class members on notice that they must act to protect their rights. The tolling procedure established by the Supreme Court in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), would have no meaning without its corollary requirement that as soon as the class is decertified, former class members who want relief must "make timely motions to intervene" (414 U. S. at 553).

Finally, it should be noted that the timeliness requirements of Rule 24 have been interpreted more strictly by the courts

after judgment, where absent very unusual circumstances intervention is not permitted. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 436 (C. D. Calif. 1967), *affirmed per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U. S. 580 (1968):

> The requirement of timeliness is not without foundation. The interest in expeditious administration of justice does not permit litigation interminably protracted through continuous reopening. A motion to intervene after entry of the decree should therefore be denied in other than the most unusual circumstances.

Accord, Chase Manhattan Bank v. *Corporation Hotelera de Puerto Rico*, 516 F. 2d 1047, 1050 (1st Cir. 1975) (per curiam); *Pennsylvania* v. *Rizzo*, 66 F. R. D. 598, 600 (E. D. Pa. 1975); 3B *Moore's Federal Practice* § 24.13[1] (1975 ed.); 7A Wright & Miller, *Federal Practice and Procedure*, § 1916 at 579-80 (1972).

Since, in my opinion, the timeliness issue is dispositive of this case, I have not deemed it necessary to advert to the other issues raised on this appeal.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 1, 1976.

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*

No. 75-2063

CAROLE ANDERSON ROMASANTA, et al.,
Plaintiffs,
vs.
UNITED AIRLINES, INC., a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 1157
J. Sam Perry, Judge.

ORDER

On consideration of the petition of the Appellee United Airlines, Inc. for a rehearing by the Court, and, a majority of the judges in regular active service not having voted for a rehearing en banc and a majority of the panel having voted to deny a rehearing.

IT IS ORDERED that the petition of the Appellee for a rehearing be denied.

Judges Pell, Tone, Bauer and Wood voted to grant a rehearing en banc.

No. 76-545

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS R. MEITES
33 North Dearborn, Suite 920
Chicago, Illinois 60602

LYNN SARA FRACKMAN
11 South LaSalle, Suite 2200
Chicago, Illinois 60603
Attorneys for Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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OPINIONS BELOW

The opinion of the court of appeals (A14-A25) is reported at 538 F.2d 915. The opinions of the district court (A1-A13) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1976. A petition for rehearing was denied on

September 1, 1976. The petition for a writ of certiorari was filed on October 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is intervention by an excluded class member after final judgment in order to appeal an erroneous order refusing to allow an employment discrimination case to proceed as a class action barred by *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), when it does not become apparent until after final judgment that the named plaintiffs would not appeal?

STATEMENT

Prior to November 1968, petitioner United Air Lines discharged female but not male flight attendants who married. The illegality of this sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., was established on an interlocutory appeal on the issue of liability in *Sprogis* v. *United Air Lines,* 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

This case was commenced as a class action on behalf of all terminated stewardesses on May 15, 1970, during the pendency of the appeal in *Sprogis* which had been brought as an individual action. Following exhaustion of appellate review in *Sprogis,* the district court refused to convert that case into a class action, without prejudice to consideration of class treatment in this case. 56 F.R.D. 420 (N.D. Ill. 1972). Six months later, on December 6, 1972, the district court refused class treatment in this proceeding as well. (A3). Although plaintiffs were given a certificate under 28 U.S.C. §1292(b), permission to appeal this ruling was denied by the court of appeals on December 27, 1972, Misc. No. 72-8117. (A8, A14 n.3). Thereafter, partial summary judgment as to certain plaintiffs was granted, and the parties negotiated settlements. On October 3, 1975, the court entered final judgment. (A9-A12).

Respondent Liane Buix McDonald is a discharged stewardess who was excluded from participation in this case by the district court's order refusing to allow it to proceed as a class action. Two weeks after final judgment was entered on October 3, 1975, McDonald learned that the plaintiffs had decided not to seek review of the adverse class determination. (A15). That day she served and filed in the district a petition to intervene after judgment for the purpose of appealing the adverse class determination. The motion was presented four days later, on October 21, 1975, and was denied. (A15). Respondent then filed timely notices of appeal from the October 21, 1975 order denying intervention and from the October 3, 1975 final decision insofar as it made final and appealable the adverse class determination.

The court of appeals, one judge dissenting, reversed and remanded the case with directions to permit intervention and to fashion relief for the class.[1]

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[1] The court of appeals held that intervention was timely and should have been permitted under Federal Rule of Civil Procedure 24(b) as permissive intervention. The court of appeals did not reach respondent's argument that intervention was also appropriate under Rule 24(a) as a matter of right. Nor did the court of appeals reach respondent's argument that, under the circumstances of this case, she had standing to file a notice of appeal even without intervening.

ARGUMENT

The sole ground asserted as a basis for this court's review is the claim (Pet. 7) that the decision below is in "direct conflict" with a prior decision of this court, *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974).[2] Petitioner United Air Lines reads *American Pipe*, which held that the statute of limitations was tolled at least until class status was denied, as barring an ultimately successful appeal of that denial by an excluded class member who had intervened to obtain appellate review.

In fact, *American Pipe* does not address the question presented here: the circumstances under which a class member may intervene after judgment solely for the purpose of challenging the denial of class status, a denial in which the class representatives did not acquiesce until

[2]Aside from its claim that the statute of limitations has run, petitioner does not challenge the correctness of the decision below that respondent's application was timely under Rule 24. (A17). Following this Court's direction in *NAACP* v. *New York*, 413 U.S. 345, 366 (1973), to consider all of the circumstances in determining the timeliness of intervention, the Seventh Circuit considered the lack of prejudice to petitioner, the interest of respondent in obtaining class treatment, the purposes of Title VII of the Civil Rights Act and the promptness of her intervention as soon as it became apparent that the named plaintiffs would not appeal and that the representation of her interests no longer was adequate. (A16-19).

Nor does petitioner challenge the correctness of the decision below that the district court had erred in refusing to allow the case to proceed as a class action. (A19-20). These questions are therefore not before the Court. E.g., *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 121 n.6 (1974), *Namet* v. *United States*, 373 U.S. 179, 190 (1963).

after judgment. (A15). In *American Pipe*, the Court was faced with intervention for an entirely different purpose. In that case the district court had refused to allow the case to proceed as a class action, and the persons excluded from the case sought to intervene to become co-plaintiffs, acquiescing in the district court order denying class status and seeking to litigate only their individual claims—as individuals, not as representatives. The Court held that for the purpose of prosecuting individual claims as a co-plaintiff or as a plaintiff in an independent action, the statute of limitations is tolled during the pendency of the class action. As Mr. Justice (then Judge) Stevens noted in *Jimenez* v. *Weinberger*, 523 F.2d 689, 696 (7th Cir. 1975), there was no need for the Court to consider in *American Pipe* whether the statute of limitations would continue to be tolled if the putative class representative had appealed from the adverse class determination.

Here the issue turns not on whether Ms. McDonald can now independently pursue her individual claim in this suit or elsewhere.[3] It turns on whether she and the other members of the class after final judgment are to be de-

[3] On November 2, 1976 this Court granted certiorari in *United Air Lines* v. *Evans*, No. 76-333, 45 U.S.L.W. 3329. Ms. Evans had "involuntarily resigned" as a United Air Lines stewardess in 1968 in response to United's no-marriage rule. Pet. for Writ of Certiorari, *United Air Lines* v. *Evans*, at 3. She is thus a member of the plaintiff class in the present case. However, after the district court had erroneously denied class treatment and excluded her from this matter, she filed a charge of continuing discrimination with the EEOC and then instituted her own individual action. Although it arises ultimately from the same discriminatory policy, *Evans* is otherwise unrelated to this case. *Evans* involves the question of whether a rehired employee who has lost seniority is a victim of continuing discrimination, a far remove from the timeliness of intervention after judgment to appeal an adverse class determination.

nied appellate review of the district court's interlocutory (and erroneous) order, even when their representatives had been denied interlocutory review and had indicated—at least until after final judgment—that they would continue to represent the class on appeal. The timeliness of her intervention to obtain such review hinges not on the time constraints on bringing an independent action, as in *American Pipe,* but on when her representation in the pending suit became inadequate. *NAACP* v. *New York,* 413 U.S. 345, 367 (1973); *Jimenez* v. *Weinberger,* 523 F.2d 689, 695-97 (7th Cir. 1975); *Hodgson* v. *United Mine Workers,* 473 F.2d 118, 130 (D.C. Cir. 1972). As the court below correctly held, that occurred when the named representatives announced after final judgment that they would not pursue efforts to appeal the class denial any further. (A17). *American Pipe,* where the interveners sought to become co-plaintiffs and acquiesced in the adverse class determination, is thus inapposite.

In addition, the conventional four-year limitations provision, 15 U.S.C. § 15(b), involved in *American Pipe* is in no way comparable to the "statute of limitations" (Pet. 7 & n.4) relied on by petitioner, Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e). This provision refers only to timely exhaustion of an administrative remedy by the filing of an EEOC charge. There is no dispute here that this requirement was satisfied by the named plaintiffs.[4] And

[4] The administrative exhaustion requirement had been satisfied when Ms. Romasanta filed her grievance with the EEOC on July 25, 1967. Respondent's limitations argument confuses the 180-day period in which to exhaust the grievance mechanism under Title VII with what is the true limitation under the Act, the then 30-day period proscribed by section 706(f) of the Act, 42 U.S.C. §2000e-5(f), in which suit must be brought after a right to sue letter issues. This judicial limitations period in this matter was satisfied for the class when Carol Romasanta filed suit on May 15, 1970, 28 days after she received her right to sue letter.

in agreement with this Court and the decisions of other circuits, the court of appeals correctly held (A18 n. 8) that the administrative exhaustion requirement was satisfied once one member of the class had initiated the grievance mechanism.[5] Class-wide satisfaction follows from the class treatment ordered by the decision below (which is not here challenged or before the Court), and so no legitimate limitations problem under Title VII arises in this case.[6]

[5] *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 411 n.8 (1975); *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711, 720 (7th Cir. 1969); *Macklin* v. *Spector Freight Systems,* 478 F.2d 979, 989 (D.C. Cir. 1973); *United States* v. *Georgia Power Co.,* 474 F.2d 906, 925 (5th Cir. 1973).

[6] Petitioner also claims that the decision in this case will "frustrate the policy of Title VII to encourage conciliation and voluntary settlement." (Pet. 11). But any "settlements" which trade away relief to those who have suffered from unlawful employment discrimination should be frustrated.

In addition petitioner's own conduct demonstrates that the rule it urges is not needed to advance settlements. Here, United settled with plaintiffs with no assurances whatsoever that they would refrain from ultimate appeal of the adverse class determination. There is nothing in the final judgment order surrendering the appeal right (A9-12), and in fact the decision not to appeal was not finally made until two weeks after final judgment. (A15). If petitioner had wanted assurances that plaintiffs would not appeal, it could have tried to negotiate for a term making the payment of the settlement funds conditional until the time for appeal had passed. Petitioner's willingness to enter into this settlement with no such assurances belies its argument.

CONCLUSION

Intervention after judgment for the purpose of taking an appeal is an old and well-established procedural device. See, e.g., *Smuck* v. *Hobson,* 408 F.2d 175, 181-82 (D.C. Cir. 1969); *Arizona* v. *Hunt,* 408 F.2d 1086, 1092 (6th Cir.), *cert. denied,* 396 U.S. 845 (1969); *Pellegrino* v. *Nesbit,* 203 F.2d 463 (9th Cir. 1953); *Wolpe* v. *Poretsky,* 144 F.2d 505, 508 (D.C. Cir. 1944); *United States Casualty Co.* v. *Taylor,* 64 F.2d 521, 526-27 (4th Cir. 1933); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.,* 3 F.R.D. 162 (S.D.N.Y. 1942). Cf. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 ~~F.2d~~ U.S. 129, 134-36 (1967) (intervention after judgment to formulate decree). See generally 3B *Moore's Federal Practice* ¶24.13, at 527-28 & nn. 15, 16 (1976); Wright & Miller, *Federal Practice and Procedure* §1916, at 582-83 & n.14 (1972). Intervention here was timely as that phrase is used and understood in Rule 24, and nothing in *American Pipe,* which does not involve intervention to take an appeal, is to the contrary. *American Pipe* is inapposite, and it is therefore respectfully submitted that a writ of certiorari be denied.

Respectfully submitted,

THOMAS R. MEITES, ESQ.
33 North Dearborn, Suite 920
Chicago, Illinois 60602

LYNN SARA FRACKMAN, ESQ.
11 South LaSalle, Suite 2200
Chicago, Illinois 60603
Attorneys for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-545

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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1. Respondent appears now to concede that under *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), the limitations period for putative class members begins to run upon denial of class status by the trial court. But respondent attempts to distinguish between the running of the limitations period when one seeks to intervene to assert an individual claim and when one seeks to intervene to appeal the class determination. Respondent suggests that although the limitations period had run for one purpose, it did not for the other. Resp. Br. 5.

This is a unique theory of jurisdiction. Under it, if the intervenors in *American Pipe* had delayed four more days before attempting intervention and thus had been beyond the limitations period, their claims could nonetheless have been revived if they had only waited until after final judgment. *American Pipe* makes no sense unless it means that after class denial,

putative class members must act within the remaining limitations period to protect their interests or are thereafter foreclosed. Respondent's assertion that the intervenors there "acquiesced" (Resp. Br. 5) in the class determination is meaningless—the intervenors there had no other choice but intervention if they wished to assert their claims. *See* 3B Moore's Federal Practice (1975 Supp.) ¶ 23.90, n. 11.

2. Respondent's reference to *United Air Lines* v. *Evans*, 534 F. 2d 1247 (7th Cir. 1976), in which this Court granted certiorari on November 2, 1976 (76-333), dramatically illustrates the mischief in respondent's position and in the decision below. Ms. Evans, who resigned in February 1968 pursuant to United's then existing no-marriage rule, claims in her own case seniority rights and back pay from the time of her rehire by United in 1972. Respondent alleges that Evans is also a member of the class in this case (Resp. Br. 5 n. 3). In respondent's view, whether *Evans* is ultimately reversed or affirmed is of no matter. For in either event, all Ms. Evans need do, according to respondent, is join the class in this case and then claim back pay from 1968 and restoration of seniority rights. Ms. Evans pursued her own remedy, and whether she acted timely or not is one of the questions to be decided by this Court. If respondent is correct, Ms. Evans can start all over again in this case—and *Evans* will have concluded nothing.[1]

3. Respondent sat back from September, 1968, when her employment terminated to October, 1975. She claims she was aware of all proceedings during the intervening period, but took

1. We do not agree that Ms. Evans is part of any class. The decision below sheds no light on composition of class and ignored the fact that the trial court denied class for lack of numerosity—the same basis of denial as in *American Pipe*. The issue here is whether the trial court's determination should have been reached by the court below. Respondent attempts to cloud the issue by characterizing the trial court's 1972 decision as "erroneous." As the dissent noted, "Since . . . the timeliness issue is dispositive, I have not deemed it necessary to advert to the other issues raised on this appeal." (Pet. App. A25.)

no action because she relied on the named plaintiffs to appeal the denial of class action. She now asserts the named plaintiffs did not acquiesce in the denial of class until after final judgment and that petitioner settled with plaintiffs and intervenors without assurance that they would not appeal the adverse class determination after judgment. Respondent is in error. The final order was an agreed order of dismissal with prejudice from which plaintiff and intervenors could not appeal, as plaintiff's counsel admitted in open court.[2]

Respondent could have acted at any time up to June, 1973; she offers no valid reason why she did not. Had she attempted and been denied intervention then, that decision would have been immediately appealable (see Pet. 5, Dissenting Op., Pet. App. A24). That she claims reliance on what she thought the named plaintiffs might have done is as irrelevant as was the belief of the claimant in *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 466 (1975), that he could rely on his assertion of a Title VII claim to suspend the running of the limitations period on his § 1981 claim. The obligation of putative class members to act timely after denial of class status and the possibility that named plaintiffs might but need not appeal the denial are as separate and independent as were the Title VII and § 1981 claims in *Johnson*. Respondent, indeed, "has slept on her rights."[3] 421 U. S. at 466.

2. The cases cited by respondent in support of intervention after judgment (Resp. Br. 8) are not relevant here. These cases arose out of circumstances where the trial court has permitted intervention for purposes of appealing final judgment where the intervenors were bound by the judgment. Respondent McDonald is not bound by the final order in this case. Her claim was barred by her own inaction after denial of class status, not by the final judgment which determined the rights only of named plaintiffs and those who timely intervened. See *Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171, 178 (5th Cir. 1975), cert. den. 96 Sup. Ct. 1508 (1976).

3. "We note further that the motion for class action certification was denied by the district court on March 13, 1973, and the stipulation of settlement was entered into on February 22, 1974; thus,

(Continued on next page)

4. Respondent claims petitioner does not challenge the correctness of the decision below under Rule 24 (Resp. Br. 4, n. 2). Respondent is in error. We noted in the Petition that Rule 24 cannot enlarge the statute of limitations, but allows for the discretion of the trial court to deny intervention even within the statutory period (Pet. 9). The majority decision below applied Rule 24 to expand the limitations period without discussing the abuse of discretion standard which would be applicable if the respondent had in fact acted within the statutory period. See opinion of Justice Blackmun in *American Pipe*, 414 U. S. at 561-62.

Respondent attempted to intervene 5½ years after this action was started, 3 years after denial of class status and 7 years after her employment was terminated. In denying intervention, the trial judge observed that "litigation must end." *American Pipe* held that "the commencement of the class action . . . suspended the running of the limitation period only during the pendency of the motion to strip the suit of its class character." 414 U. S. at 561. This litigation ended for respondent no later than June 1973—2½ years before her first overt act in October 1975.

Respectfully submitted,

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
(312) 782-0600.

November 24, 1976.

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any party who failed to seek intervention in the consolidated action between those two dates can blame no one but himself if his action is now barred." *Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171, 178 (5th Cir. 1975), *cert. den.* 96 Sup. Ct. 1508 (1976).

IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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BRIEF FOR PETITIONER UNITED AIR LINES, INC.

OPINIONS BELOW.

The opinions and orders of the district court striking the class action allegations (December 6, 1972), dismissing the action after settlement with named plaintiffs and intervenors (October 3, 1975), and denying intervention to respondent (October 21, 1975), are unreported and appear in Appendix at 55, 90, and 102, respectively. The opinion of the court of appeals is reported at 537 F. 2d 915 (7th Cir. 1976) (Appendix 104).

JURISDICTION.

The judgment of the court of appeals was entered on July 1, 1976. A timely petition for rehearing and suggestion for in banc rehearing was denied on September 1, 1976. A timely petition

for writ of certiorari was filed on October 19, 1976. The Court granted the writ of certiorari on December 6, 1976. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The relevant portions of Section 706(e) and (f) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(e), (f), are set forth below.

> Sec. 706. (e) A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred. . . .
>
> Sec. 706. (f)(1) . . . If a charge filed with the Commission . . . is dismissed by the Commission . . . or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

Federal Civil Procedure Rule 23, Class Actions, and Rule 24, Interventions, are set out in an appendix to this brief, *infra*.

QUESTIONS PRESENTED.

A class action was filed in May 1970, claiming violation of Title VII of the Civil Rights Act of 1964. In December 1972 the class allegations were stricken on the motion of defendant—petitioner here. A number of the purported class members then intervened. Respondent McDonald, although a member of the claimed class, did not seek to intervene. In October 1975, a final order of dismissal with prejudice was entered after settlement with named plaintiffs and intervenors. Thereafter respondent attempted to intervene for the purpose of appealing the December 1972 denial of class status.

1. Did the statute of limitations, tolled upon filing of the class action, commence running upon denial of class status in December 1972 under the doctrine of *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974)?

2. Did the district court err in denying respondent's motion to intervene, as the majority of the court of appeals held?

STATEMENT OF THE CASE.

Background.

This case comes before the Court as the most recent manifestation of a series of cases which have been weaving their way through the federal courts since November 1968, arising out of petitioner United's long-abandoned "no-marriage" rule for female flight attendants.[1]

Until November 7, 1968, it was United's policy to terminate stewardesses (now called "flight attendants") upon marriage (although transfer to an available non-flying position was permitted). On that day, United entered into a formal agreement with the Air Line Pilots Association ("ALPA"), the collective bargaining agent for the flight attendants, ending the "no-marriage" rule. The agreement also provided that any flight attendant whose employment had been terminated because of the rule and who had registered some form of complaint about the termination—either through the contractual grievance procedure or through a federal or state agency—would be entitled to reinstatement without loss of seniority but without back pay. A. 20.

1. *United Air Lines* v. *Evans*, No. 76-333, now before this Court, relates to the "no-marriage" rule. Other cases include *Lansdale* v. *United Air Lines*, 437 F. 2d 454 (5th Cir. 1971); *Collins* v. *United Air Lines*, 514 F. 2d 594 (9th Cir. 1975); *Sprogis* v. *United Air Lines*, 308 F. Supp. 959 (N. D. Ill. 1970), 444 F. 2d 1194 (7th Cir. 1971), *cert. denied* 404 U. S. 991 (1971), 56 F. R. D. 420 (N. D. Ill. 1972), 517 F. 2d 387 (7th Cir. 1975); *Inda* v. *United Air Lines*, 405 F. Supp. 426 (N. D. Cal. 1975); *Buckingham* v. *United Air Lines*, Civ. No. 71-731-LTL (C. D. Cal. 1975).

Several of the eligible flight attendants accepted the reinstatement offer; others were not heard from; some instituted civil actions, seeking back pay as well as reinstatement.

The first action was filed by Mary Burke Sprogis on November 27, 1968 in the Northern District of Illinois, claiming the no-marriage rule violated the sex discrimination provisions of Title VII of the Civil Rights Act of 1964.

In *Sprogis* v. *United Air Lines,* 444 F. 2d 1194 (7th Cir. 1971), *cert. den.* 404 U. S. 991 (1971), the court of appeals affirmed the trial court's holding that the no-marriage policy did violate Title VII as discrimination in employment based on sex. The court of appeals remanded to the district court the reserved question whether the action—commenced as an individual suit—could be converted to a class action after judgment.

In May 1970, while the *Sprogis* case was pending on appeal, this action—filed as *Romasanta* v. *United Air Lines*[2]—was commenced as a class action by another former flight attendant apparently as a hedge against a possible adverse determination in the court of appeals in *Sprogis* on the class action question. The claimed class was the flight attendants terminated pursuant to the no-marriage policy. A. 11. Both the *Romasanta* and *Sprogis* cases were financed by ALPA, and plaintiffs in both suits were represented by the same counsel. Both cases were assigned to the same district judge.

The *Romasanta* case was held on the passed case calendar pending the decision on appeal in *Sprogis.* A. 1. After the court of appeals remanded *Sprogis,* plaintiffs moved to certify a class in *Sprogis* and to consolidate the two cases. A. 23.

In June 1972, the trial court ruled that class action was not appropriate in *Sprogis* and denied the plaintiffs' motion to consolidate. 56 F. R. D. 420 (N. D. Ill. 1972). A. 25. No appeal

2. Carole Anderson Romasanta was plaintiff in the trial court. The suit was ultimately settled and dismissed as to her and she was not a party to the appeal below, although her name appeared in the caption as plaintiff. Liane Buix McDonald, respondent here, was petitioning intervenor in the trial court and appellant in the court of appeals. See A. 104.

was taken by plaintiff Sprogis or any purported class member, including respondent here, from this decision.[3]

After the district court refused to consolidate the two cases, United moved to strike the class allegations in *Romasanta,* and on December 6, 1972 this motion was granted. A. 55.

The trial court believed that the class should be limited to those who had manifested an interest in retaining their jobs by filing some protest. The legal issues had been settled in *Sprogis;* four years had elapsed since the no-marriage rule had been abrogated; and therefore the district court was concerned that former flight attendants who had had no real interest in continued employment would now join the action solely to recover back pay. The court stated A. 60:

> In considering the equities, it does not seem fair and reasonable to this court that it should allow a stewardess terminated prior to November 7, 1968 to intervene here unless she indicated in a timely manner her desire to continue working by taking some affirmative action to protest United's policy or seek reinstatement.[4]

3. The district court referred to a special master the issue of a back pay award for Ms. Sprogis. The Court approved the master's award of $10,408 but denied an award of attorney fees. After final judgment the denial of attorney fees was appealed, but not the refusal to certify a class. *Sprogis* v. *United Air Lines,* 517 F. 2d 387 (7th Cir. 1975).

4. The record disclosed that after the no-marriage rule was abrogated a substantial number of flight attendants continued to terminate employment on marriage. Thus, between November 7, 1968, when the rule was abrogated, and December 31, 1971, 455 flight attendants resigned assigning marriage as the reason. Another 363 went on leave of absence because of marriage and did not return upon termination of the leave. A. 54. In the court of appeals, Ms. McDonald cited a stipulation between United and the Equal Employment Opportunity Commission in another case to the effect that between 1969 and 1973 (during which period the no-marriage rule was *not* in effect) 913 out of 3,599 flight attendant terminations were because of marriage, Pet. Br. Ct. App. 10n. It was thus reasonable for the district judge to require some evidence of interest in continuing in the job before admitting a flight attendant discharged four years earlier to a class where the only issue would be the amount of back pay recovery.

The appropriate class being limited to those flight attendants who had made some timely protest against the no-marriage policy, the class allegations were stricken since the numerosity requirements of Rule 23 were not met. Those who had protested the policy, and had not already settled their claims or initiated actions elsewhere, were permitted to intervene.

Twenty-five former flight attendants sought intervention. Respondent McDonald was not among them. Intervention was allowed as to thirteen; eight were denied because they had accepted reinstatement under the November 1968 agreement; four who had instituted actions elsewhere were also denied intervention. A. 58-60.

The named plaintiffs Romasanta and Altman[5] unsuccessfully petitioned for permission to appeal under 28 U. S. C. § 1292(b) the trial court order of December 6, 1972. None of the individuals denied intervention made any attempt to appeal, although the order was clearly final and appealable as to them.[6]

Discovery and settlement discussions followed and the initial and intervening plaintiffs were able to settle their back pay claims by application of the principles worked out in *Sprogis*. A. 91. On October 3, 1975—almost three years after class action status was denied—a final order dismissing the suit with prejudice was entered, all "matters in controversy . . . having been settled and resolved." A. 90, 92.

Three weeks later, on October 21, 1975, respondent McDonald first entered the scene. Ms. McDonald is a former United flight attendant who was terminated in September 1968 under the then existing no-marriage policy. She filed no grievance under the collective bargaining agreement, no charge with any state or federal agency, participated in no litigation, and had in no manner previously made known her belated claim against

5. In October 1970 Brenda Altman, another former flight attendant, was added as a party plaintiff.

6. An order denying intervention is final and appealable. *EEOC* v. *United Air Lines*, 515 F. 2d 946, 948-49 (7th Cir. 1975).

United. She was fully aware of the *Romasanta* and *Sprogis* litigation and of the denial of class status in December 1972 (A. 95), but took no action of any kind until October 21, 1975.

On that day Ms. McDonald filed a motion to intervene for purposes of appealing from the December 1972 order denying class action status. A. 93. Submitted with the motion was an affidavit of Ms. McDonald stating, *inter alia*, that she "had previously been informed that during the course of this lawsuit, the Court had struck the class action allegations and so excluded me and others like me from this action. . . ." A. 95.

The trial judge denied the motion to intervene as untimely. During hearing on the motion he expressed concern that respondent McDonald had not sought intervention at the time of his December 1972 order, or to appeal from or seek modification of that order. He concluded (A. 101):

> Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek any relief from this Court in any way during that period of time, and litigation must end. I must deny this motion.

Ms. McDonald then filed two notices of appeal, one appealing the denial of intervention and the other appealing the order of December 6, 1972, denying class action status. A. 103.

The Decision of the Court of Appeals.

The court of appeals reversed in a two-one decision. The majority held the motion to intervene was timely under Federal Rule 24(b) since it was filed soon after respondent McDonald was advised by the named plaintiffs that they would not appeal the order of December 1972 denying class status. The majority rejected United's contention that under *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), the limitations period started to run against Ms. McDonald in December 1972 when the trial court denied class status and this limitation period had long since expired. The majority dis-

tinguished *American Pipe* in a footnote, on the ground that in Title VII actions the statute was tolled upon the filing of a charge with the Equal Employment. Opportunity Commission ("EEOC")—a non sequitur since the issue on appeal was not the commencement of the tolling period, but rather when the statute started to run again. A. 108 n.6.

Having concluded that Ms. McDonald was entitled to be an intervenor, the majority held it had "power to examine the adverse class ruling." In a one paragraph examination of the class issue (with which the district judge had wrestled through numerous hearings and briefings), the majority decided the order denying class action status "must be reversed." A. 109.

Judge Pell, in dissenting, stated that under *American Pipe* the statute of limitations began to run again in December 1972 upon denial of class action status, and that Ms. McDonald had to act promptly thereafter "if she wanted to take advantage of this lawsuit as a forum for her claims." A. 110. He concluded by stating that since the timeliness issue was dispositive, "I have not deemed it necessary to advert to the other issues raised on this appeal." A. 115.

The eight active members of the court of appeals divided four-four on the suggestion of a rehearing in banc. A. 117.

ARGUMENT.

Summary.

American Pipe & Construction Co. v. *Utah*, 414 U. S. 538, 561 (1974), holds that the applicable statute of limitations is tolled upon the filing of a class action but "only during the pendency of a motion to strip the suit of its class action character."

The district court here denied class action status in December 1972. The attempted intervention by respondent was properly denied in October 1975 since the attempt came more than

two years after the expiration of any conceivable applicable limitation period.

The majority of the court of appeals erroneously assumed, contrary to *American Pipe*, that tolling of the limitations period continued after class action denial and at least until the final order of dismissal by the district court in October 1975. Intervention was considered timely because it was attempted soon after respondent McDonald learned that the named plaintiffs and intervenors did not intend to appeal class denial after entry of the final order.

Plaintiffs and intervenors had no obligation to appeal class denial after final judgment and could not appeal since they had settled their claims and their complaints were dismissed with prejudice. Respondent acquired no derivative right from them.

The decision below, if it prevails, would frustrate settlement after class denial since parties will be required to await exhaustion of appellate review of class denial after final order before knowing the limits of potential liability. The capacity of the district court to manage suits after class denial will be impaired.

Class actions under Title VII are subject to the requirements of Federal Civil Procedure Rule 23, as are all class actions, and *American Pipe* is not distinguishable because it involved an anti-trust class action.

Respondent's claimed reasons for waiting seven years after termination of her employment, five years after commencement of this suit and three years after denial of class action are not plausible. Had she been interested in continued employment with United she could have been reinstated within weeks after her termination in September 1968.

The statute of limitations aside, the district court did not abuse its discretion under Federal Civil Procedure Rule 24(b) in concluding that respondent's attempt to intervene after the entry of the final order was not timely.

I.

This Court's Decision in American Pipe Mandates Reversal of the Decision of the Court of Appeals.

American Pipe & Construction Co. v. *Utah,* 414 U. S. 538, 540 (1974), "involve[d] an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts."

There an anti-trust class action had been commenced 11 days before the applicable one-year statutory period expired. Seven months later the trial court issued its order denying class action status, basing it upon lack of numerosity. Eight days thereafter a number of potential class members sought to intervene. Intervention was denied by the trial court on the theory that denial of class status had the effect of "untolling" the statute of limitations as though the class suit had not been filed. Since the remaining 11 days statutory period had long expired, the intervenors were too late.

The court of appeals disagreed and held that permissive intervention was timely under Rule 24(b)(2) since, for limitations purposes, the rights of intervenors related back to the commencement of the suit. *Utah* v. *American Pipe & Construction Co.*, 473 F. 2d 580, 584 (9th Cir. 1973). Certiorari was granted to "consider a seemingly important question affecting the administration of justice." 414 U. S. at 545.

After examining the development of Rule 23 both before and after the 1966 amendments, this Court concluded that "at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene.*" 414 U. S. at 553. (Emphasis added.)

In its conclusion, the Court fleshed out the concept of "timely" and the duration of tolling (414 U. S. at 561):

> [T]he commencement of the class action in this case suspended the running of the limitation period *only during the pendency of the motion to strip the suit of its class action character.* The class suit brought by Utah was filed with 11 days yet to run in the period as tolled by § 5(b) [of the Clayton Act], and the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene. Since their motions were filed only eight days after the entry of Judge Pence's order, it follows that the motions were timely. [Emphasis added.]

Justice Blackmun's concurrence expressed some concern lest the decision be construed as an open invitation to revival of stale claims.[7] The concurring opinion cautioned (414 U. S. at 561):

> Our decision, however, must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class.

Referring to Rule 24(b), Justice Blackmun observed (*Id.* at 562):

> Permissive intervenors may be barred, however, if the district judge, in his discretion, concludes that the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Fed. Rule Civ. Proc. 24(b). The proper exercise of this discretion will prevent the type of abuse mentioned above and might preserve a defendant whole against prejudice arising from claims for which he has received no prior notice.

It appeared to petitioner United that this decision had critical relevance to a consideration of the propriety of the district judge's ruling denying Ms. McDonald's motion to intervene

7. So described in 3B Moore's Federal Practice Par. 23.90 at 23-1653 n.11 (1975 Supp.).

five years after the suit commenced, three years after denial of class status, and after final dismissal of the action with prejudice upon settlement of the claims of named plaintiffs and intervenors. Accordingly, its importance was stressed to the court of appeals.

The court of appeals majority opinion disposed of *American Pipe* in a footnote (A. 108):

> 6. See also *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 551. The specific holding in *American Pipe* that the statute of limitations is tolled only during the pendency of the motion to certify a class and begins to run anew if the motion is denied is not applicable here. The statute of limitations in Title VII actions is suspended once one member of the class initiates the grievance mechanism. See *Bowe* v. *Colgate-Palmolive Co.*, [416 F. 2d 711, at 720 (7th Cir. 1969)].

The reference to *Bowe* was irrelevant: the holding of *Bowe* and other cases, including *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414 (1975), that unnamed class members need not exhaust administrative procedures is not in issue here. Certainly at least one named plaintiff must pursue the administrative remedy and file a suit within the statutory period to meet the "jurisdictional prerequisites to a federal action."[8] The issue here is not the initial tolling, but rather when the limitations period begins running again. With respect to this issue, the majority opinion of the court of appeals did not explain why the tolling was not lifted in December 1972 with the order of denial of class action status, as *American Pipe* appears to require.

In concluding that the petition to intervene was timely under Federal Rule 24(b)—permissive intervention—the majority stated (A. 109):

8. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973). Named plaintiff Romasanta did in fact meet the time requirements of Title VII, both as to filing a charge with the EEOC within the then applicable 90 day period and initiating the suit within the then applicable 30 day period after receipt of notice of right to sue. Complaint. ¶¶ 2, 10. A. 12, 13.

> [I]n court . . . the members may rely on the champion of the class until he or she abdicates. In this case we believe that abdication occurred when plaintiffs decided not to appeal the adverse class action determination. To hold otherwise would permit one member of the class to obtain benefits greater than other members.

The "abdication," held the majority, came two weeks after the final order of dismissal of October 3, 1975, when the individual plaintiffs who had settled their claims allegedly advised Ms. McDonald they had decided not to appeal the class action denial of December 1972.

The vice in the majority decision is its assumption that the class action continued after class status was denied. This is inconsistent with *American Pipe*, which holds that tolling continues only until that point. If this Court's view was that class status would continue after denial by the district court on the possibility that there might eventually be a successful appeal of the denial, then its comment that interventions were timely because they came within 11 days of the denial order is inexplicable.

Pearson v. *Ecological Science Corp.*, 522 F. 2d 171 (5th Cir. 1975), *cert. den.* 425 U. S. 912 (1976), followed *American Pipe* in a decision which considered a number of issues relating to the duty of the parties remaining after class denial to the purported members excluded by the class denial. One claim was that after class denial notice of a subsequent settlement between the named plaintiffs and intervenors and defendant should have been given to the proposed, but denied, class. To this the court responded (522 F. 2d at 176-77):

> The arguments of the appellants and the S.E.C. [amicus] ignore the difference between a class action and a non-class action. They place undeserved emphasis upon mere allegations of class action status by individual plaintiffs, rather than upon a judicial determination that a cause of action does not meet the requirements of subdivisions (a) and (b) of Rule 23 and, therefore, may not be maintained as a class action.

* * * * *

> Appellants and the S.E.C. ask this court to extend the judicial gloss on subdivision (e) of Rule 23 to encompass the situation where as here the trial court has determined prior to the execution of a settlement agreement that the action may not be maintained as a class action under Rule 23. This we decline to do. As stated by the Advisory Committee's Notes to Rule 23, *"a negative determination* [of class action status] means that *the action should be stripped of its character as a class action."* Advisory Committee Notes, *supra,* 39 F. R. D. at 104 [Emphasis in original.]

When here the majority of the court below spoke of the "abdication of the champion of the class" in October 1975 to justify respondent's belated intervention, it clearly ignored the fact that once the class was denied in December 1972, there was no longer a class to champion. The named plaintiffs did not abdicate as champions in October 1975; they were dethroned in December 1972.

Judge Pell in dissent put the issue succinctly (A. 115):

> When a class action is denied, former putative class members may not ignore this fact and continue on the assumption the suit is a class action. . . . The denial of class status is a critical point which puts putative class members on notice that they must act to protect their rights. The tolling procedure established by the Supreme Court in *American Pipe* . . . would have no meaning without its corollary requirement that as soon as the class is decertified, former class members who want relief must make "timely motions to intervene." (414 U. S. at 553.)[9]

In our view, *American Pipe* permits of no other reading than that given it by the dissent. If the intervenors there had not moved within the 11 days remaining of the suspended period,

9. Judge Pell pointed out that had Ms. McDonald acted promptly after denial of class action and had been denied intervention at that time because of her failure to protest the no-marriage rule—the requirement which was the basis of the district court's holding that the action lacked the requisite numerosity—"then that issue would have been before this court and decided three years ago." A. 114.

their efforts would not have been "timely." No other reading is possible.[10]

It is the fact, of course, that instead of entering into settlement discussions with defendant, the named plaintiffs and intervenors could have persisted through full trial to judgment and after final judgment could have appealed the denial of the class action of December 1972. But they chose not to do so and instead did enter into a settlement and agreed to a final order dismissing the actions with prejudice. As a result of this they could no longer appeal the denial of class.[11] They had no duty or obligation to respondent McDonald not to settle their claims, and Ms. McDonald could gain no derivative rights of appeal from them. The most she could do was hope they might appeal, but she had no legal right to expect it. If the limitations period had already run against her, it could not be revived because the individual claimants remaining after class denial chose to settle rather than continue the litigation.

10. Two courts of appeal have considered this corollary of *American Pipe.* In *Pearson* v. *Ecological Science Corp.,* 522 F. 2d 171, 178 (5th Cir. 1975), *cert. den.* 425 U. S. 912 (1976), the court concluded that any party who failed to seek intervention after class action status denial and entry of a settlement stipulation "can blame no one but himself if his action is now barred." In *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co.,* 511 F. 2d 1073 (10th Cir. 1975), a class was certified narrower than the claimed class. Excluded members attempted intervention but were held to be time-barred. The argument was made that this differed from the *American Pipe* situation because here a class had been certified and there intervention had been allowed. In rejecting these contentions the court held (511 F. 2d at 1078):

> In the instant case 26 days of the suspension period remained when class status was denied the private contractors. The first petitions in intervention were presented 40 days thereafter. *American Pipe* may not be distinguished on the differences between the two cases for denial of class status, or on the fact that there intervention was permitted and here it was denied. The holding in *American Pipe* cuts both ways.

11. Counsel for named plaintiffs and intervenors stated in open court after the final order had been entered: "They have settled their individual claims, and consequently the original class action representatives are not in a position to take the appeal." A. 100-1.

This issue was also confronted in *Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171 (5th Cir. 1975), *cert. den.* 425 U. S. 912 (1976). There—as here—class had been denied, timely intervention had been allowed, an interlocutory appeal of denial of class was attempted, and then settlement was reached. An effort was then made to block the settlement by, among others, a late-comer who was denied intervention as untimely sought. Argument was made that the settlement—which included an agreement to voluntarily withdraw a petition for writ of certiorari to review the refusal of the court of appeals to consider the denial of class—breached the obligation the named plaintiffs and intervenors had to the purported class members. The court demurred (522 F. 2d at 177):

> The rule which appellants ask this court to adopt would require that in every action in which class action certification is denied by a district court, the named plaintiffs would be precluded from executing a settlement of their individual claims, and would be required to litigate through appellate review of the interlocutory order denying class action certification after a final judgment in the trial court.

Settlement is always preferred to litigation; Title VII suits are certainly no exception to the principle. The Seventh Circuit Court of Appeals has itself recognized this policy in an earlier decision. ". . . As a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where 'there is great emphasis . . . on private settlement and the elimination of unfair practices without litigation.' "*ALSSA* v. *American Airlines*, 455 F. 2d 101, 109 (7th Cir. 1972), citing *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 498 (5th Cir. 1968).

The majority decision here imposes the same inhibiting effect on settlement noted in *Pearson* since the defendant will not know the full breadth of the claims against it after class action denial unless and until there is opportunity for appellate review after final judgment. The capacity of the district court to manage suits

after class denial is also seriously impaired. It is difficult to encourage settlement among litigants when the judge is faced with the possibility of a renewal of the litigation even if settlement is consummated. He will not be able to address the issues as limited by him because he will be forced to look over his shoulder to purported class members, unknown to the court, who like respondent McDonald may someday appear.[12] This flies directly in the face of the express policy in favor of conciliation and voluntary settlement stated in Title VII. 42 U. S. C. § 2000e-5(b).

There is, to our knowledge, no serious dispute with the proposition that Federal Rule 23 applies to class actions under Title VII. This has been repeatedly affirmed.[13]

Further, we do not believe respondent McDonald would deny that, if the limitations period began to run against her and others

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12. Conceptually there is no end to the process. Ms. McDonald claims a class broad enough to include not only flight attendants who were terminated but also those who resigned without protest. If this case is remanded to the trial court a class could be found which includes those terminated, like Ms. McDonald, but excludes those like Ms. Evans, respondent in No. 76-333, now pending before this Court, who resigned. When that has run its course and a final order is entered, then Ms. Evans or someone in a similar position could do just as Ms. McDonald did here and seek to start the whole process over again. The possibilities are limitless.

13. *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 (3d Cir. 1975), cert. den. 421 U. S. 1011 (1975) ("The mandatory requirements of Rule 23(a) must first be met."); *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 499 (5th Cir. 1968) ("We thus hold that a class action is permissible under Title VII . . . within the following limits. First, the class action must . . . meet the requirements of Rule 23(a) and(b)(2).") *Wright* v. *Stone Container Corp.*, 524 F. 2d 1058, 1062 (8th Cir. 1975) (". . .[W]e cannot say that the trial court abused its discretion in refusing to certify the class under Rule 23(a)."); *Nance* v. *Union Carbide Corp.*, 540 F. 2d 718, 723 (4th Cir. 1976) (". . . [E]mployee discrimination suits do not represent exemptions from the terms of the Rule [23(a)].")

similarly situated upon denial of class action status in December 1972, any conceivable period has long since run out.[14]

Ms. Romasanta, the original plaintiff, received the required statutory notice[15] from the EEOC on April 17, 1970 (A. 13), and she filed her class action on May 15, 1970—the 28th day of the then allowable 30 day period for bringing suit under Section 706(f). 42 U. S. C. § 2000e-5(f). Thus there were two days left to the limitations period at the time the suit was filed. Assuming the 90 day period provided under the March 1972 amendments to Title VII would be applicable at the time the suit was dismissed in December 1972, Ms. McDonald would have had 62 days (90 less 28) in which to move to intervene, and if unsuccessful, to then appeal that denial.

Even if it be assumed that Ms. McDonald would at that time have been entitled to avail herself of the entire statutory period for filing a charge with the EEOC on the theory her obligation to file had been tolled by the filing of a charge by Ms. Romasanta prior to Ms. McDonald's termination, that period would have been 180 days from December 6, 1972. Section 706(e), 42 U. S. C. § 2000e-5(e).

In any event, whichever period is considered—62 days under Section 706(f) or 180 under Section 706(e)—the last day on which Ms. McDonald could possibly have made a motion in this case not time barred would have been June 4, 1973, almost two and one-half years before she did in fact file a motion to intervene.

In summary, *American Pipe* holds that the limitations period, tolled upon commencement of a class action, starts running again upon denial of class status; class actions under Title VII are

14. The EEOC in an amicus brief filed in the court below conceded that the "statute of limitations in the Romasanta and Altman [the additional named plaintiff] charges has since run." EEOC Br. Ct. App. 20.

15. The procedure is outlined in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973).

not unique and the *American Pipe* doctrine is applicable here as in any other class action; the limitations period expired no later than June 4, 1973; when Ms. McDonald attempted to intervene on October 21, 1975, the statute of limitations had run as to her claim and her motion was untimely under Rule 24(b)(2).

II.

The District Court Did Not Abuse Its Discretion in Denying Intervention.

There is an undertone to the majority opinion below which suggests that an injustice would have been done respondent had the court of appeals not reversed the district court's ruling on intervention. "To hold otherwise," said the majority, "would permit one member of the class to obtain benefits greater than other members." A. 108.

But this is the effect of timeliness requirements and statutes of limitations in all litigation, including class actions.[16] If the

16. The ruling below creates the anomaly that parties who unsuccessfully brought their own suits to protest United's former no-marriage rule are now barred by the statute of limitations and *res judicata* from being granted relief while respondent and other purported class members at this time unknown, who have done nothing for at least eight years, may now seek recovery. Several former United stewardesses who had been terminated because of the no-marriage rule filed an action in 1971 in the United States District Court for the Central District of California. The trial court denied relief because the plaintiffs, who had been terminated in 1966 and 1967, had not filed timely charges in accordance with the provisions of Title VII. *Buckingham* v. *United Air Lines, Inc.*, Civil No. 71-731-LTL. In addition, Doris Collins, who resigned in May, 1967, filed a charge with the EEOC in November, 1971 and instituted an action in the Western District of Washington in November, 1972. She was denied relief by the trial court because her charge was not timely filed. This action by the trial court was affirmed by the Ninth Circuit in *Collins* v. *United Air Lines, Inc.*, 514 F. 2d 594, 596 (9th Cir. 1975). Because of the lawsuit pending at that time in the District Court, Collins was denied intervention in this case below. And, in reliance on the *Collins* opinion, summary judgment was granted on August 5, 1975 by the trial court below against Lynn Mason Raymond, a purported class member who had been allowed to intervene in 1972. This dismissal was not appealed.

intervenors in *American Pipe* had waited four more days the named plaintiffs would also have "obtained greater benefits." Rights are created by the legislature subject to being exercised within a proscribed period. When the period ends, the right ends. The court majority described a consequence of limitations periods—not a reason for ignoring them.[17]

The other side of the coin is that a potential defendant has the right to know that if claims are not asserted against it in an expeditious manner, *i.e.*, within the limitations period, then its exposure is ended.[18]

The record here dramatically illustrates the real inequity in this case. Respondent had no interest in further employment with United after her termination in September 1968. If she had she could have been back at work within a few weeks by simply talking some action to protest the termination.

17. "In defining Title VII's jurisdictional requirements 'with precision,' . . . Congress did not leave to courts the decision as to which delays might or might not be slight." *IUE* v. *Robbins & Myers*, 45 U. S. L. W. 4068, 4070 (S. Ct., Dec. 20, 1976).

18. The majority opinion states that "until October 17th [1975] defendant [United] could reasonably expect this liability to be enforced through an appeal of the adverse class ruling." A. 108. This observation is completely without record support. Once settlement discussions were started United had every reason to believe there would be no appeal of the class issue.

One additional reason why United could assume there would be no appeal of the class denial lies in a point made by respondent McDonald in the lower court in justification of her assumption named plaintiffs would appeal class denial: ". . . plaintiffs' attorneys are interested in obtaining a class treatment on appeal since it has the prospect of a larger overall recovery and the resulting increased potential for court awarded fees." Pet. Reply Br. Ct. App., 17n.

The fact is the district court had denied attorney fees to plaintiff's counsel in *Sprogis* on July 3, 1974, and the denial had been affirmed by the court of appeals on June 4, 1975. *Sprogis* v. *United Air Lines*, 517 F. 2d 387 (7th Cir. 1975). The same counsel represented the parties in this case under the same circumstances which led to denial of fees in *Sprogis*. It was thus apparent that to the extent pursuit of attorney fees could be considered an incentive to appeal class denial, that incentive was certainly lacking here. Attorney fees were in fact subsequently denied in this case on the same grounds as in *Sprogis*.

The November 7, 1968 agreement between United and ALPA terminating the no-marriage policy provided for reinstatement for those flight attendants who protested. At the time of that agreement a protest by Ms. McDonald would have been timely. But she did nothing. She waited from September 1968 to October 1975 to come forward to claim reinstatement and back pay for the seven year period. The majority opinion consoles United with the observation that "This opinion does not preclude the defendant from mitigating liability or rebutting the damage claim of some members of petitioner's [McDonald] class." A. 110 n.8. But assembling rebuttal evidence at this late date is an awesome burden.[19]

Respondent explains her seven years of inaction in an affidavit submitted with the intervention petition (A. 95):

> At the time of discharge or soon thereafter, I learned that other former United Air Lines stewardesses who had been discharged pursuant to the same policy were prosecuting grievances under the collective bargaining machinery or had filed charges of discrimination with state and federal agencies. Since the legality of the no-marriage policy was being challenged in proceedings that I thought would govern my situation, I did not myself file a discrimination charge against United or grievance under the collective bargaining agreement.

This reason—even if plausible—does not explain why she did not act then to get her job back under the terms of the United-ALPA Agreement.

But the reason is not plausible. In September 1968, it was not settled law that an individual could rely on the charge of another in pursuing a claim under Title VII. *Oatis* v. *Crown Zellerbach*, 398 F. 2d 496 (5th Cir. 1968), had reversed a

19. The court of appeals had held in *Sprogis* that United had to demonstrate that a claimant lacked reasonable diligence in seeking other employment, and that "the burden of going forward to mitigate the liability, or, to rebut the damage claim, rests with the defendant." *Sprogis* v. *United Air Lines*, 517 F. 2d 387, 392 (7th Cir. 1975).

lower court which held that class action would not lie under Title VII where injunctive relief was sought. The appeals court decision was issued on July 16, 1968, and was limited to prospective relief. However unlikely, it is possible that Ms. McDonald knew about *Oatis* when she was terminated in September 1968. But she would also have known it did not sanction a class action for back pay—and as we have noted she could have had prospective relief under the ALPA-United Agreement of November 1968. It was not until October 1969 when the Seventh Circuit Court of Appeals promulgated its decision in *Bowe* v. *Colgate-Palmolive*, 416 F. 2d 711 (7th Cir. 1969), that there was a definitive holding that a class action would lie under Title VII for "pecuniary" as well as injunctive relief. 416 F. 2d at 720. In fa ', this issue was not conclusively settled until this Court's decision in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414 (1975).

The original case of *Sprogis* v. *United Air Lines* (see *supra*, at p. 4), was not brought as a class action, no doubt, because when filed in November 1968 prospective relief was unnecessary since the no-marriage policy had already been abrogated, and *Bowe* had not yet been decided. It was only after *Bowe* that an attempt was made to convert *Sprogis* to a class action and that this suit was filed as a class action.

Ms. McDonald simply could not have known in September, 1968 that she could rely on actions taken by others. Her explanation for seven years of inaction is inadequate. She has, indeed, slept on her rights.

Moreover, however inexplicable is her claimed reliance in 1968 on legal doctrines not definitely established in this Court until 1975, it is clear that Ms. McDonald did know that after December 1972 she was no longer in this case—and yet she still failed to act.

Her affidavit is quite candid. She states she had "previously been informed that during the course of this lawsuit, the Court had struck the class action allegations and so excluded me and

others like me from this action and that an attempt to appeal this ruling had not been successful." A. 95.

Certainly the exclusion of Ms. McDonald from this suit in 1972 was a critical point for her. In *NAACP* v. *New York*, 413 U. S. 345 (1974), this Court upheld a district court's ruling that an attempted intervention 17 days after the would-be intervenors first learned of the pendency of a suit then three months old was untimely under Rule 24. The suit had then reached a "critical stage" and it was "incumbent upon [them] at that stage of the proceedings, to take immediate affirmative steps to protect their interests . . . by way of an immediate motion to intervene." 413 U. S. at 367.[20]

The Court spelled out the general criteria for review of the district court's determination of timeliness under Rule 24 (413 U. S. at 365-66):

> Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely". If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all of the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.[21]

20. *See also SEC* v. *Bloomberg*, 299 F. 2d 315, 320 (2d Cir. 1962) (court of appeals affirmed denial of the SEC's motion to intervene in a reorganization proceedings as untimely because the SEC had waited 40 days after it was in a position to intervene); *Hoots* v. *Pennsylvania*, 495 F. 2d 1095, 1097 (3d Cir. 1974) cert. den. 419 U. S. 884 (1974) (intervention denied because "petitioners could not reasonably claim ignorance either of the proceedings or the necessity for intervention at a much earlier date").

21. The same standards under Rule 24 apply in cases involving Title VII of the Civil Rights Act. *E.g.*, *EEOC* v. *United Air Lines*, 515 F. 2d 946 (7th Cir. 1975); *Black* v. *Central Motor Lines*, 500 F. 2d 407 (4th Cir. 1974).

As Judge Pell explained in dissenting below, where a class action is involved the determination of when intervention "is first appropriate relates to the question of adequacy of representation;" for it becomes necessary for unnamed class members to intervene at the point when their interests are no longer being protected by the class representatives. A. 112. See *Alleghany Corp.* v. *Kirby*, 344 F. 2d 571, 574 (2d Cir. 1965), cert. granted 381 U. S. 933, cert. dismissed as improvidently granted, 384 U. S. 28 (1966).

When class action was here denied in December 1972 and the action was thus "stripped of its class character" under Rule 23, Ms. McDonald was required then to take "immediate affirmative steps" to protect her interests. As the dissenting judge below stated (A. 113):

> When petitioner's application for intervention is viewed in the light of [the above] cases, it appears clear to me that the motion was untimely. Petitioner admits knowledge of the class action denial in Romasanta in 1972 and yet offers no persuasive reason for her failure to petition to intervene then. Once the class was denied, and the suit proceeded as an individual action, she had no reason to believe her interests were being represented or protected by others. This was particularly true since the class action denial had the effect of excluding from the case all those who, like petitioner, had not protested the no-marriage rule. There was no longer anyone similarly situated to petitioner in the case.

Thus even if Ms. McDonald's motion in October 1975 had not been barred because of the expiration of the limitation period, it is clear that the district judge did not abuse the discretion vested in him under Rule 24 in finding that her motion to intervene came too late.

The admonition of the concurrence in *American Pipe* is singularly appropriate (414 U. S. at 561-62):

> Our decision, however, must not be regarded as encouragement to lawyers . . . to frame their pleadings as a class action . . . to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class.
>
> . . . The proper exercise of this discretion [by the district judge under Rule 24(b)] will prevent the type of abuse mentioned above and might preserve a defendant whole against prejudice arising from claims for which he has received no prior notice.

CONCLUSION.

For the foregoing reasons, we respectfully request that the decision of the court of appeals be reversed and that the decision of the district court of October 21, 1975, denying the petition of respondent to intervene be affirmed.

Respectfully submitted,

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604.

January 21, 1977.

APPENDIX.

PARTIES.

Rule 23.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24.

INTERVENTION.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C. § 2403.

No. [illegible]

Supreme Court of the United States

October Term, 1976

UNITED AIR LINES, INC.,

Petitioner,

vs

LIANE BUIX McDONALD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT LIANE BUIX McDONALD

THOMAS R. MEITES
33 North Dearborn, Suite [illegible]
Chicago, Illinois [illegible]

LYNN SARA FRACKMAN
11 South LaSalle, Suite [illegible]
Chicago, Illinois [illegible]

KENNETH N. FLAXMAN
[illegible] North Clark Street
Chicago, Illinois [illegible]
Attorneys for Respondent

[illegible]

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT LIANE BUIX McDONALD

QUESTION PRESENTED

In this case, an employer engaged in unlawful employment discrimination against a numerous class of persons. A class action, meeting the timeliness requirements of Title VII and the prerequisites for a class action under Federal Rule of Civil Procedure 23, was commenced by one of the aggrieved employees. The district judge incorrectly refused to grant class treatment, and interlocutory review of the class action order was not permitted. Within thirty days of entry of final decision, an excluded class member was informed that the named plaintiff had decided not to appeal the now final class ruling. On the day she learned

of this decision, she petitioned to intervene to prosecute the appeal. On this appeal, her intervention was found timely and the adverse class ruling was reversed.

The question presented is whether respondent and others similarly situated are barred from the relief required by Title VII because the appeal to correct the adverse class determination was prosecuted by an excluded class member, rather than by one of the named plaintiffs, where the excluded class member had timely intervened after judgment to take the appeal.

STATEMENT OF THE CASE

This case should mark the end of United Air Lines' herculean efforts to escape its obligations to respondent McDonald and others similarly situated.[1] The liability

[1] In contrast to the ordinary practice of a defendant faced by similar claims from members of a numerous class, United—rather than transfer and consolidate all similar cases, *cf.* 28 U.S.C. § 1407—has managed to keep this litigation scattered in a number of forums. This has allowed it (1) to defend its "no-marriage" rule on the merits in cases in the Northern District of Illinois, *Sprogis* v. *United Air Lines,* 308 F.Supp. 959 (N.D. Ill. 1970), aff'd, 444 F.2d 1194 (7th Cir. 1971), *cert. denied,* 404 U.S. 991 (1971), and in the Northern District of California, *Inda* v. *United Air Lines,* 405 F. Supp. 426 (N.D. Cal. 1975), *cross appeals docketed,* No. 75-1527 (March 6, 1975) and No. 75-2174 (May 29, 1975) (9th Cir.), (2) to escape until the Seventh Circuit's decision in this case a class-wide remedy, (3) to sever married stewardess claims from trial in a comprehensive attack on its discriminatory practices mounted by the EEOC in *EEOC* v. *United Air Lines,* No. 73 C 962 (N.D. Ill.), a trial which led to a broad consent decree including monetary redress and (4) to rely on procedural victories to escape liability in a number of individual actions. *E.g., Collins* v. *United Air Lines,* 514 F.2d 594 (9th Cir. 1975); *Buckingham* v. *United Air Lines,* 11 FEP Cases 344 (C.D. Cal. 1975). *Cf. Lansdale* v. *United Air Lines,* 437 F.2d 454 (5th Cir. 1971).

(footnote continued)

arises from United's discriminatory "no-marriage" rule,[2] the illegality of which was conclusively determined in *Sprogis* v. *United Air Lines,* 308 F.Supp. 959 (N.D. Ill. 1970), *aff'd,* 444 F.2d 1194 (7th Cir. 1971), *cert. denied,* 404 U.S. 991 (1971), and is no longer at issue. Although seven years have elapsed since the district court declared the illegality of the "no-marriage" rule, a remedy has yet to be provided to respondent and others similarly situated. In the decision now before this Court for review, the Seventh Circuit declared that class-wide relief should be furnished, but United as it has done in forum after forum in these cases urges this Court to find relief unavailable because of technical defenses.

1. Background: Sprogis v. United Air Lines

Prior to November 1968, United forbade its female but not its male flight attendants to marry, and any stewardess

(footnote continued)

Another casualty of United's unlawful "no marriage" rule is befor the Court in *United Air Lines* v. *Evans,* No. 76-333, *cert. granted,* 45 U.S.L.W. 3329 (Nov. 2, 1976). Evans had "involuntarily resigned" as a United Air Lines stewardess in 1969 because of the "no marriage" rule. *Evans,* Pet. Br. 4 . In 1972 she was hired by United "as a new stewardess" (*id.*) and subsequently filed an EEOC charge complaining of a continuing violation arising from United's failure to have afforded her retroactive seniority. (*Id.* at 5.) Evans is a member of the class in the instant case, and if the decision of the court of appeals here is affirmed she would be entitled in this case to the relief she seeks, irrespective of the validity of her theory of a continuing violation under Title VII.

[2] The no-marriage rule required that female flight cabin attendants be single when first employed and remain unmarried under penalty of discharge. There were no comparable restrictions on male cabin attendants. *Sprogis* v. *United Air Lines,* 444 F.2d at 1196 n.2.

(but not steward) who married was terminated. Although this discriminatory "no-marriage" policy became unlawful in 1965 on the effective date of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq, United retained the rule until November, 1968. It is estimated that more than 160 women were terminated under the rule during this period. (A. 57, 105.)

A number of the victims of this unlawful discrimination challenged United's "no-marriage" rule by filing charges with the Equal Employment Opportunity Commission. The first charge was filed in August, 1966 by one Mary Sprogis, who had been terminated by United on June 19, 1966. *Sprogis* v. *United Air Lines,* 444 F.2d at 1196. In 1968 the EEOC found reasonable cause to believe that United's policy constituted illegal sex discrimination, and on October 31, 1968 it issued Sprogis a right to sue letter. *Id.* She thereafter filed a timely, albeit individual action against United in the Northern District of Illinois.

On cross motions for summary judgment, the district court found that United's "no-marriage" rule was unlawful sex discrimination, contrary to Title VII. *Sprogis* v. *United Air Lines,* 308 F. Supp. 959 (N.D. Ill. 1970). The district court held that Ms. Sprogis was entitled to reinstatement as a stewardess and to compensation for her lost earnings, in an amount to be subsequently determined. Mindful of the purpose of Title VII to provide class-wide relief for class-wide discrimination, the district court requested memoranda on whether relief "should be made applicable to other Stewardesses discharged by Defendant." 308 F. Supp. at 961. United was permitted an interlocutory appeal on the issue of liability by the Seventh Circuit under 28 U.S.C. §1292(b), and the district court stayed

computation of the amount of back pay and resolution of the question of class-wide relief pending final adjudication of the question of liability. 444 F.2d at 1197. The Seventh Circuit affirmed United's liability, and this Court denied review. *Sprogis* v. *United Air Lines,* 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

2. Attempts To Obtain Class-Wide Relief

The present case was commenced during the pendency of United's interlocutory appeal in *Sprogis.* The original named plaintiff[3] had also exhausted the EEOC procedures and had timely brought suit on behalf of herself and all other similarly terminated United Air Lines stewardesses. (A. 11). In its answers to the complaint and amended complaint United denied that its no-marriage policy violated Title VII. (A. 17-18.) It also claimed that even if its policy requiring termination of stewardesses upon marriage was discriminatory in light of its policy towards male stewards, the policy had been adopted in reliance on an EEOC opinion. (*Id.*) Alternatively it claimed that an unmarried status was a bona fide occupational qualification for

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[3] Carole Leigh Romasanta, the original named plaintiff in this action, had been discharged by United on May 9, 1967. In response to a timely filed charge of sex discrimination, the EEOC on January 19, 1970 found that United in discharging her under its policy of terminating female flight attendants on marriage had "committed unlawful employment practices." (A. 13.) On April 17, 1970, the EEOC issued Ms. Romasanta a right to sue letter, and 28 days later, on May 15, 1970, she timely filed this class action on behalf of herself and all similarly terminated United stewardesses. (A. 13, 1, 11.) At that time the original *Sprogis* decision was on appeal to the Seventh Circuit. Shortly after Romasanta commenced this case, Brenda Bailes Altman was added as a named plaintiff by amendment to the complaint. (A. 1.)

woman flight attendants "necessary to the normal operation of the position of a stewardess." (A. 18.) United also raised specific defenses against Romasanta and Altman. (A. 19, R. 20.)

Following final adjudication of the liability question in *Sprogis* (I), plaintiffs in this case sought to consolidate their suit with *Sprogis,* then pending before the same judge. (A. 23). Contemporaneously with this motion to consolidate, Ms. Sprogis moved to enlarge her case into a class action.[4] Both motions were denied, without prejudice to consideration of class treatment in this case. 56 F.R.D. 420, 423 (N.D. Ill. 1972) (A. 25, 29).[5] However, six months later, on December 6, 1972 the district court refused to allow this case to proceed as a class.[6] The court announced that it would permit intervention by those stewardesses who had personally "protested" their discharge and whose names and addresses were known to counsel.[7] The effect of these orders was to deny a remedy to respondent McDonald and others similarly situated who had not individually "protested" United's unlawful employment practices.

[4] The Seventh Circuit had held that an extension of relief to those similarly situated as contemplated by the trial court was not inconsistent with Rule 23 and was within the plenary powers granted trial courts by section 706(g) of Title VII, 42 U.S.C. §2000e-5(g). 444 F.2d at 1201-02. The Seventh Circuit also noted, 444 F.2d at 1201, that "[a]t stake . . . are the interests of the other members of that class and the court has a special responsibility in the public interest to devise remedies which effectuate the policies of the Act as well as afford private relief to the individual employee instituting the complaint." Despite this, the district court on remand declined to expand *Sprogis* into a class action. Six months later, it denied class treatment in this case.

[5] The district court later explained its refusal to convert *Sprogis* into a class action: "I don't contend that a class action couldn't be maintained by other persons. It is my theory that if it is going to be a class action, let there be a class action in the beginning, so that the Court can have the full advice of all counsel and full defense. Certainly a defendant might make one defense and spend X dollars in defending an individual action; whereas if it were made a class action, they might spend a great deal more time of investigation and legal talent and what not if it is a class action." Hearing of July 28, 1972. (A. 34.)

[6] The district court articulated two reasons for refusing to allow the case to proceed as a class action. It doubted the effectiveness of the class mechanism. (A. 61.) Also it felt that "it is reasonable for the union and defendant United to assume that since they did not protest they had no further interest in further employment." (A. 57.) The court therefore held that a class could consist only of those women who had personally filed a charge with a federal or state agency or a collective bargaining grievance. No more than thirty women within this limitation could be identified, an insufficient number in the district court's view to satisfy the numerosity requirement of Federal Rule of Civil Procedure 23(a). (A. 60.)

[7] However, of the twenty-four "protesting" stewardesses who petitioned to intervene, twelve were not allowed to join in the case. Eight women, who had accepted reinstatement under an agreement between United and the Air Line Pilots Association, were denied intervention on an election of remedies theory. (A. 58.) Three women were excluded because their claims were pending before state agencies. (A. 58-59.) Also denied intervention was Doris Rivas Collins. She had personally filed an EEOC charge and commenced a Title VII action in the Western District of Washington. *Id.* (Collins' EEOC charge was later held untimely, her suit was dismissed and she was denied any relief. See *Collins* v. *United Air Lines,* 514 F.2d 594 (9th Cir. 1975).) Also excluded were women who plaintiffs believed to exist but were unable to locate. One such person was later located in April 1973, and she was permitted to intervene. (A. 4-5, R. 56.)

The district court recognized that interlocutory review of its class order would "materially advance the ultimate termination of the litigation" (A. 61) and certified the order for an interlocutory appeal under 28 U.S.C. §1292(b), as had occurred on the issue of liability in *Sprogis*. The named plaintiffs timely sought permission to appeal. They explained why interlocutory review of the class action order would "materially advance the termination of the litigation" as follows:

> The District Court's Order and Memorandum substantially alters the nature of this suit. Instead of a class action composed of possibly well over one hundred members, the District Court's Order converts the suit to an individual action on behalf of fourteen individuals. The District Court's order precludes the bulk of Stewardesses discharged by reason of their marriage from seeking reinstatement and back pay. If this appeal is accepted and if the District Court's Order is reversed, the final stage of this lawsuit, the determination of the damages owing to Stewardesses now deemed to be ineligible to recover, would be materially advanced. The alternative, if this appeal is not permitted until the final judgment in the District Court, would not only delay the final termination of the case but also would result in the duplication of damage award proceedings, since the damages owing to the fourteen persons now joined in the suit would then have been determined. Moreover, delay imposes an unnecessary burden on Stewardesses—all of whom were discharged due to marriage prior to November 1968; the longer the delay, the less likely that an individual will be in a position to disrupt her established way of living in order to accept reinstatement as a Stewardess. For these reasons, an immediate appeal of the issues decided in the District Court's Order and Memorandum may materially advance the termination of the litigation. (A. 71-72.)

The Seventh Circuit, however, denied plaintiffs permission to appeal (A. 82), and the result, as the named plaintiffs had foretold in their petition for permission to appeal (A. 72), was that review of the class action was not permitted until the final judgment in the District Court, in October 1975.

3. Adjudication of Individual Claims

Following the refusal of the court of appeals to grant interlocutory review of the class action orders, the parties then began litigation of the individual claims. After defendant had deposed eight of the plaintiffs, those who had not as yet obtained reinstatement moved for partial summary judgment on liability and for an order granting reinstatement. (A. 83.) A number of these motions were opposed by defendant. (R. 61.) The plaintiffs who had obtained reinstatement moved for summary judgment on the issue of liability and entitlement to compensation for lost earnings. (A. 86-87.) On July 2, 1974, the district court granted the motions for summary judgment of the reinstated plaintiffs, holding as it had in *Sprogis* that the terminations "pursuant to a policy requiring that all Stewardesses be unmarried when hired and remain unmarried while so employed constitute unlawful sex discrimination . . . in violation of Title VII of the Civil Rights Act of 1964 . . . ." (A. 88.) As it had done in *Sprogis*, the district court decreed that plaintiffs were entitled to compensation for their loss of earnings resulting from defendant's wrongful conduct. *Id.* And again, following the procedure in *Sprogis* (308 F. Supp. at 961-962), the district court observing that the record did not disclose the amount of compensation lost by plaintiffs appointed a special master to make recommendations as to the amount of back pay due to each plaintiff. (A. 88.)

The special master appointed in this case had also been appointed in *Sprogis*. His recommendation of monetary compensation for Sprogis had been approved by the district court on July 3, 1974 and affirmed on appeal, *Sprogis* v. *United Air Lines*, 517 F.2d 387 (7th Cir. 1975) (*Sprogis II*). The special master and the parties applied the guidelines developed in *Sprogis* (*II*) to the claims of the individual plaintiffs in this case (A. 91), and United paid the amounts so determined. In a final decision entered on October 3, 1975, after all moneys due as compensation for lost wages had been paid over by United to plaintiffs, the court denied one contested claim, resolved a dispute as to seniority and entitlement of compensation of another plaintiff and dismissed with prejudice the claims of plaintiffs who had prevailed. (A. 91-92.)

4. Intervention After Judgment To Appeal The Adverse Class Determination

Respondent Liane Biux McDonald is a former United stewardess who was excluded from participation in the case by the adverse class determination. McDonald was discharged by United under its no-marriage policy in September, 1968 after serving as a United stewardess continuously since 1965. (A. 95.) She knew that other terminated United stewardesses were prosecuting EEOC charges and union grievances, and she did not file another charge of grievance since she believed these would govern her situation.[8] *Id.* This meant, however, that she found herself

[8] Without any support in the record, petitioner asserts (Pet. Br. 6-7) that respondent had failed to make her claim known to United. This is not the case. Respondent McDonald was listed in a computer print-out in United's own records by name, social security number, senority date, monthly salary and date of termination as a stewardess whom United had terminated under its no-marriage policy.

(footnote continued)

excluded by the adverse class determination and the trial court's ruling that only persons who had individually filed could recover against United in this action.

On October 8, 1975, McDonald was informed by plaintiffs' counsel that a final decision had been entered in the case on October 3, 1975. (A. 95.) Although she knew that plaintiffs had tried, albeit without success, to gain interlocutory review of the class ruling, on October 8th she was informed that it was unlikely that they would prosecute an appeal of this now final ruling. (A. 95.) McDonald sought and obtained counsel, and on October 17, 1975 was told that plaintiffs would definitely not appeal. On that day, she served a petition to intervene under Federal Rules of Civil Procedure 24(a) and 24(b) for the purpose of continuing the case through appeal of the adverse class determination. (A. 93, R. 95.)

The petition was argued four days later, October 21, 1975. Without the receipt of any evidence from United, the district court that day at the conclusion of oral argument

(footnote continued)

(United turned this list over to plaintiffs in the summer of 1972 in response to discovery requests in preparation for briefing the issue of the numerousity of the plaintiff class.) See United's *Out Of Service Listing, 1966-71* at 155, appended to Plaintiffs' Status Report of September 11, 1972. (R. 38.) Also, after the United ALPA agreement of November, 1968 (A. 20-21) which appeared to offer some possibility of reinstatement was announced, McDonald twice contacted United to attempt to regain her position. She was told on both occasions that reinstatement was available only to those stewardesses who had on or before the effective date of the agreement personally filed a charge or a grievance and that there was nothing she could do. This limiting interpretation of the agreement is consistent with its express terms (A. 20) and appears to have been a consistent policy of United. See *Inda* v. *United Air Lines*, 405 F. Supp. 425, 429 (N.D.Cal. 1975).

denied intervention as untimely. (A. 101-02.) Two days later on October 23, 1975, within 30 days of the entry of the final decision of October 3, 1975, McDonald filed two notices of appeal, the first from the denial of intervention and the second from the order denying class status. (A. 103.)

The court of appeals reversed. It first found that the petition to intervene was timely under Rule 24 because of the lack of prejudice to United, the interest of McDonald in participation in the action through class treatment, the purposes of Title VII and McDonald's diligence in seeking to intervene as soon as she learned that the named plaintiffs decided not to appeal. (A. 106-09.) On the merits of the class determination, the Seventh Circuit held that the trial court had plainly erred in holding that the filing of a charge with a state or federal agency or the exhaustion of the collective bargaining remedy was a prerequisite to recovery. (A. 109-10.) The case was remanded with instructions that the matter proceed on a class basis and that the district court fashion relief for the class consisting of all similarly situated former United stewardesses. (A. 110.)

SUMMARY OF ARGUMENT

United no longer contends that being unmarried is "reasonably necessary to the normal operation of the position of stewardess" (third affirmative defense, A. 18), and does not dispute that the district court erred in refusing to fashion class relief for respondent and others similarly situated. The issues presented in this case arise from the fact that the reversal of the adverse class determination was obtained through an appeal prosecuted by respondent—an excluded class member who had timely intervened after judgment—rather than by one of the named plaintiffs.

Respondent McDonald filed her petition to intervene for the purpose of taking an appeal within 18 days of final judgment in the district court. As the court of appeals correctly held, after considering the purpose of the intervention, the inadequacy of representation, the lack of prejudice to defendant and the policies of Title VII, intervention was timely.

The timely filing of an EEOC charge and the subsequent filing of this class action satisfied the limitations period of Title VII for all members of the class as it was subsequently determined by the court of appeals. Nothing in *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), requires a different result. The novel tolling principle urged by petitioner is contrary to the broad class relief required by Title VII, and seeks to resuscitate the arguments rejected by Congress when it refused to limit class actions in Title VII cases. The only claimed benefit from petitioner's novel tolling principle is that it would facilitate settlements, but the only settlements encouraged by petitioner's rule would be "sell-outs" contrary to the policies of Title VII.

Respondent's petition to intervene after judgment was timely, and her remedy under Title VII is not barred by any statute of limitations. The novel tolling theory urged by petitioner must be rejected, and the judgment of the court of appeals affirmed.

I.

McDONALD'S INTERVENTION AFTER JUDGMENT TO OBTAIN REVIEW OF THE CLASS RULING WAS UNDER ALL THE CIRCUMSTANCES TIMELY.

This action was commenced to obtain a remedy under Title VII for the over one hundred and sixty women who were the victims of United Air Lines' "no marriage" policy. In the course of the litigation, the district court erroneously refused to provide class relief, holding that a remedy would only be available for those—unlike respondent and perhaps 140 others—who had personally filed their own charges against the "no marriage" rule.[9] An appeal could not be taken from the adverse class determination as a matter of right,[10] and the court of appeals refused the named plaintiffs permission to appeal pursuant to 28 U.S.C. §1292(b). (A. 82.) Appellate correction of the class action order was therefore postponed until an appeal could be perfected from the final decision.

There is no real question that the named plaintiffs could have appealed from the final decision and obtained review of the adverse class determination. See *Senter* v. *General Motors Corp.*, 532 F.2d 511, 519-20 (6th Cir. 1976) (cases collected); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 751 n.7 (1976). But, as their attorney explained in the district court (A. 100), "[O]ur plaintiffs have chosen not to do so." Immediately after learning of this decision and within the 30-day period for perfecting an appeal, respon-

[9] Requiring that a victim of unlawful employment discrimination individually protest the employment practice is plainly wrong. *Bowie* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 411 n.8 (1975).

[10] *King* v. *Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973); *Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 97 S.Ct. 272 (1976). *Cf. Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976).

dent Liane Buix McDonald filed her petition to intervene "for purposes of taking an appeal." (A. 93-95.)

Intervention after judgment for the purpose of taking an appeal is an old and well-established procedural device,[11] appropriate when as here an erroneous ruling of a trial court, if not corrected through appellate review, will have a direct, adverse effect on a person not a named party. The function of intervention after judgment was disregarded by the district judge, who denied intervention on the grounds that allowing intervention after judgment would prevent the litigation from coming to an end. (A. 101.)

It was precisely to stop the litigation from coming to an end without appellate correction of the erroneous class action order that McDonald petitioned to intervene.[12] This

[11] See, e.g., *Smuck* v. *Hobson*, 408 F.2d 175, 181-82 (D.C. Cir. 1969); *Arizona* v. *Hunt*, 408 F.2d 1086, 1092 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969); *Pellegrino* v. *Nesbit*, 203 F.2d 463 (9th Cir. 1953); *Wolpe* v. *Poretsky*, 144 F.2d 505, 508 (D.C. Cir. 1944); *United States Casualty Co.* v. *Taylor*, 64 F.2d 521, 526-27 (4th Cir. 1933); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 3 F.R.D. 162 (S.D.N.Y. 1942). See generally 3B *Moore's Federal Practice* ¶24.13, at 527-28 & nn. 15, 16 (1976); Wright & Miller, *Federal Practice and Precdure* §1916, at 583-83 & n. 14 (1972).

[12] McDonald petitioned to intervene both as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure and permissively under Rule 24(b)(2). (A. 93.) The court of appeals, after finding the petition timely, held that the intervention should have been allowed under Rule 24(b)(2) and therefore did not reach the question of whether petitioner was entitled to intervene as of right. (A. 108-09.) United does not contest this ruling, and there would appear no reason to consider intervention under Rule 24(a)(2) unless the Court finds that the determination of timeliness or resolution of United's limitations argument would be different. McDonald also argued below that she had standing to appeal directly from the final judgment in the district court as a person denied any remedy under Title VII by the class order. The Seventh Circuit also did not reach this contention.

was recognized by the court of appeals, which, after examining all of the circumstances in accordance with the standards of *NAACP* v. *New York,* 413 U.S. 345 (1973), held that intervention was timely. The petition to intervene came after entry of the final decision in the district court, and within the time the named plaintiffs could, had they so chosen, have perfected an appeal. Intervention could not, therefore, have delayed proceedings in the district court. Nor would United be prejudiced by intervention after judgment to appeal, because it "knew of the potential liability to this class since the commencement of the class action, and until October 17th, defendant could reasonably expect its liability to be enforced through an appeal of the adverse class ruling." (A. 108.) No delay can be ascribed to respondent. McDonald served the petition on the very day that she learned that the named plaintiffs had decided not to appeal and her existing representation had become inadequate. (A. 107.) Finally, intervention after judgment to appeal the adverse class determination would further the policies of Title VII to provide class-wide relief for class-wide discrimination. (A. 107-108.)[13]

[13] Although her reliance on her former fellow employees has been approved by Congress, below at 30, and by this Court, *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 411 n.8 (1975), United claims that respondent is to be faulted because she did not do more. But as McDonald makes clear in the affidavit she filed with her petition to intervene, she was aware that her former colleagues were vigorously prosecuting EEOC complaints and union grievances in September, 1968 when she was discharged, that she believed (correctly, as the law developed) that her situation would be governed by theirs and that nothing would be gained if she were to herself file repetitive charges or grievances. (A. 95.) United of course had actual knowledge of its potential exposure from these pending charges. It also had actual knowledge of respondent. It maintained in its records McDonald's name as a stewardess whom it had discharged under its no-marriage rule and to whom it was potentially liable. See United's computer printout at 155, appended to Plaintiff's Status Report of September 11, 1972, in which she is listed. (R. 38.)

United did not seek review of this finding of timeliness in its petition for writ of certiorari.[14] In its brief on the merits, however, United contends that intervention was untimely. (Pet. Br. 19-25.) "Timeliness" in United's view is to be measured solely by the passage of time from issuance of the interlocutory class action order. It argues that the petition would be timely only if made immediately after class certification was denied. The court of appeals properly rejected this argument. As this Court held in *NAACP* v. *New York,* supra, the point to which the suit has progressed is not solely dispositive, 413 U.S. at 365; otherwise, intervention after judgment would be virtually impossible. Instead, timeliness is to be determined from all of the circumstances. 414 U.S. at 366. The informed exercise of discretion, as the Seventh Circuit recognized, requires no less. (A. 106.) In this case, the status of the litigation, the purpose of intervention, the inadequacy of representation by the named plaintiffs, the lack of prejudice to defendant and the policies of Title VII made intervention—18 days after entry of the final decision—

[14] United presented only a single question in its petition for certiorari:

> Does the principle established by *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974) that the applicable statute of limitations is suspended for putative class members only until class action status is denied apply to all class actions, including those brought under Title VII of the Civil Rights Act of 1964? Pet. for Cert. 2.

This question is therefore not properly before the Court. Supreme Court Rule 40(1)(d)(2); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 428-49 (1964); *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 321 n.3 (1967).

timely. Intervention prior to entry of the final decision would have been premature, first because it would not have occasioned appellate review of the adverse class determination, and second because there was no reason to believe that the named plaintiffs had retreated from their stated indication (A. 71-72) to seek review of the adverse class determination on an appeal from the final decision.[15]

Under all of the circumstances intervention in this case was timely, and respondent was properly before the court of appeals to obtain reversal of the class determination.

II.

ROMASANTA'S TIMELY FILING OF THIS CLASS SUIT COMMENCED THE ACTION FOR ALL MEMBERS OF THE CLASS AS SUBSEQUENTLY DETERMINED BY THE SEVENTH CIRCUIT, INCLUDING RESPONDENT McDONALD.

It is settled that the limitations periods of Title VII are satisfied for all victims of class-wide employment discrimination when one aggrieved employee files a timely EEOC charge and then commences a class action within the time limits of Sections 706(e) and 706(f)(1), 42 U.S.C. §§2000e-5(e), 5(f)(1). *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 411 n.8 (1975). As petitioner concedes (Pet. Br. 12), the limitations periods of Title VII were satisfied for respondent and others similarly situated when Carole

[15] Also, a petition to intervene at an earlier point would have been futile, since the district court had ruled that only persons who had filed individual charges or grievances could intervene. (A. 56-57.)

Anderson Romasanta filed her EEOC charge and then commenced this class action twenty-eight days after issuance of a right to sue letter.[16]

That a statute of limitations is tolled for all members of a class by the timely commencement of a class action is apparent from *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). When, as here, an adverse class determination is reversed on appeal, the rights of formerly excluded class members "are to be determined as if the class action had been allowed instead of being incorrectly determined below." *Esplin* v. *Hirschi*, 402 F. 2d 94, 101 n.14 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).[17]

United agrees that the statute of limitations would have remained tolled had the named plaintiffs prosecuted the appeal from the final decision to obtain reversal of the adverse class determination. (Pet. Br. 15.) But because the appeal was prosecuted by an excluded class member who timely intervened after judgment (see above at 14-18), United argues that a statute of limitations has run to bar relief for respondent and other excluded class members. (Pet. Br. 18.)

[16] In 1970 a Title VII charge had to be filed within 180 days of the alleged unlawful employment practice, 42 U.S.C. §2000e-5(d) (redesignated in 1972 as §2000e-5(e)), and suit filed within 30 days of issuance of the right to sue letter, 42 U.S.C. §2000e-5(e) (amended 1972). These time periods were satisfied here. Romasanta was discharged on May 9, 1967 and filed her charge with the EEOC on July 25, 1967. (A. 13.) She filed this class action on May 15, 1970, 28 days after she had been issued a right to sue letter. (A. 13, 1.)

[17] United did not seek review of the decision by the court of appeals that this case should have been allowed to proceed as a class action. This ruling is therefore not before the Court. *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 121 n.6 (1974); *Nemet* v. *United States*, 373 U.S. 179, 190 (1963).

United does not attempt to reconcile its statute of limitations theory with either the language or the legislative history of Title VII or the policies underlying Rules 23 and 24. Instead, United relies on a skewed reading of *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974). We disagree. In our view, under familiar principles which have been applied to statutes of limitations, *Burnett* v. *New York C. R. R.,* 380 U.S. 424, 435 (1965), the correct rule after *American Pipe* is that when, as here, an appeal from the final decision results in reversal of the unfavorable class ruling, the statute of limitations remains satisfied for the class by the timely commencement of the class action as though the class had been correctly permitted by the District Court.

A. United's Rule Is Inconsistent With Familiar Suspension Principles And Would Waste The Resources Of Courts And Litigants.

The novel tolling rule urged by United would renew the running of the limitations period between the time of an adverse class determination in the trial court and its reversal on appeal (or even on reconsideration in the trial court), no matter how erroneous the ruling and no matter how exhaustive had been the efforts of the named plaintiffs to obtain interlocutory review.[18] This "untolling" of the limitations period would not take place immediately, but would depend upon whether

[18] The class ruling here, which held that only persons who had personally filed a charge were entitled to relief, was plainly wrong when issued. The *Seventh Circuit in Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969), had previously rejected that limitation on Title VII relief. The named plaintiffs vigorously sought immediate, interlocutory review, to no avail. (A. 62-72, 83.)

the named plaintiffs later decide to appeal from the final decision. Only if the plaintiffs elected not to appeal would United argue that the statute had run. United concedes (Pet. Br. 15) that there would be no statute of limitations defense if the named plaintiffs had appealed from the final decision, a concession necessary if an erroneous class ruling is not to be completely immunized from review.

The question of whether a statute of limitations started to run in 1972—for 90 or 180 days[19]—would therefore be determined by events which take place, as here, some three years later when following entry of the final decision, the named plaintiffs elected not to appeal. United claims (Pet. Br. 14) that its tolling principle is the corollary requirement of *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974). We disagree with this reading of *American Pipe.* In our view, a determination that a case shall be maintained on a class basis gives all class members the benefit of the suit's timely commencement.

In *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), the parties excluded from participation in a case by an adverse class determination sought to intervene in the trial court proceedings. 414 U.S. at 543-44. The issue was whether these intervenors could benefit from any tolling of a statute of limitations brought about by commencement of the class suit. The Court answered this narrow question in the affirmative. But unlike this case, plaintiffs and intervenors had acquiesced in the adverse class determination, 414 U.S. at 552, and the Court had no need to determine whether a statute of limitations, tolled by the commencement of the original class suit, remains satisfied when, as here, the adverse class determination is reversed on appeal. The Court did, how-

[19] United is unable to specify which period it considers a limitation under Title VII. See Pet. Br. 18.

ever, state the general rule that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined," 414 U.S. at 550, and lower federal courts that have considered this question have reached this result.[20] Since respondent was a member of the class "as subsequently determined," any limitations period satisfied by Romasanta's timely commencement of the class action remained tolled for McDonald and other class participants in the case.

United's rule, in contrast, would give preclusive and final effect to what has been universally regarded as a

[20] In *Esplin* v. *Hirschi*, 402 F.2d 94, 101 n.14 (10th Cir. 1968), the Tenth Circuit after reversing an adverse class determination held that the rights of class members "are to be determined as if the class action had been allowed instead of being incorrectly terminated below." See also *Jimenez* v. *Weinberger*, 523 F.2d 689, 696 (7th Cir. 1975) (Stevens, J.) ("If that decision had expressly refused to certify the case as a class action, we think the tolling would have continued if the plaintiffs had appealed from such ruling . . . ."); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 460 (E.D.Pa. 1968).

Pearson v. *Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976), relied on by United (Br. 13-16), apparently adopts the general rule. Unlike this case, the plaintiffs there had explicitly agreed in their settlement agreement not to pursue appellate review of an adverse class determination, and *Pearson* appears to indicate that the statute of limitations remained tolled up to the date of settlement agreement was approved. 522 F.2d at 178. *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co.*, 511 F.2d 1073 (10th Cir. 1975), also cited by United (Br. 15), assumed the validity of the rule without discussion, since the court considered intervenors' class question appeal on the merits and only moved on to the question of whether their intervention was otherwise time-barred after affirming the adverse class determination.

conditional and interlocutory class order.[21] That a statute of limitations conventionally remains tolled until the order ending such suspension becomes final by the running of the time during which an appeal may be taken or the entry of final judgment on appeal is apparent from *Burnett* v. *New York C. R. R.*, 380 U.S. 424 (1965). There, an FELA action[22] had been timely brought in state court within the applicable three-year limitation period but was dismissed for imroper venue. 380 U.S. at 425. Within the time to appeal the order of the state trial court, but more than three years after the claim accrued, the employee commenced an identical action in federal court. Id. at 425. Applying "familiar principles which have been applied to statutes of limitations," 380 U.S. at 435,[23]

[21] With the limited exception of the "death knell" doctrine applied in one or two circuits, an adverse class ruling is interlocutory and cannot be reviewed until after final judgment. *Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364, 1366 n.1 (7th Cir. 1976), *cert. denied*, 97 S.Ct. 272 (1976) (cases collected); *Shayne* v. *Madison Square Garden Corp.*, 491 F.2d 397 (2d Cir. 1974); *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir. 1972). As to the "death knell" exception, not applicable here, compare *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2nd Cir. 1971), with *Anschul*, 544 F.2d at 1367. The explicit terms of Rule 23(c)(1) themselves suggest the conditional nature of class rulings in the trial court. See generally *American Pipe*, 414 U.S. at 561-62 (Blackmun, J., concurring). Also inapplicable here is interlocutory review gained on an appeal of a denial of a preliminary injunction, as in *Jenkins* v. *Blue Cross Mutual Hospital Ins., Inc.*, 538 F.2d 164, 166 n.2 (7th Cir. 1976) (en banc).

[22] 42 U.S.C. §201 et seq.

[23] The "familiar principle" of *Burnett* is illustrated by cases such as *Russ Togs, Inc.* v. *Grinnell Corp.*, 426 F.2d 850, 857 (2nd Cir.), *cert. denied*, 400 U.S. 878 (1970); *Twentieth-Century Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846, 857-58 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

this Court held that the limitations period, tolled by the filing of the state action, remained tolled "until the state court order dismissing the state action becomes final by the running of the time during which an appeal may be taken or by the entry of a final judgment on appeal." Id. Nothing in *American Pipe* even faintly suggests that an interlocutory class order, reversed on appeal, should be considered final when issued in the face of this familiar principle.

Any departure from this "familiar principle" is particularly inappropriate here where intervention is for purposes of appeal. When, as here, the intervenor seeks only to continue the original cause of action, it has until this case apparently been assumed without discussion that for limitations purpose the intervenor takes the original filing date.[24] This is consistent with the requirement noted in *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), that there be "complete identity of the causes of action." 421 U.S. at 467 n.14.

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[24] No cases have been found even questioning this rule, and in related situations it has been universally assumed that intervention asserting the same cause of action will relate back. See, e.g., *Silverman* v. *Re*, 194 F. Supp. 540, 542 (S.D.N.Y. 1961) (limitations for derivative defendant corporation realigned by intervention as plaintiff suspended by initial filing by derivative plaintiff); *Brauer* v. *Republic Steel Corp.*, 460 F.2d 801, 804 (10th Cir. 1972) (intervening lessee in property damage action relates back to filing date of injured property lessor); *Link Aviation, Inc.* v. *Downs*, 325 F.2d 613, 615 (D.C. Cir. 1963) (limitation tolled by subrogee's suit for subrogated insurance company intervenor); *Pentland* v. *Dravo Corp.*, 152 F.2d 851 (3rd Cir. 1945) (intervention by fellow employee dates back to time of commencement of FLSA suit). Cf. *Escott* v. *Barchris Const. Corp.*, 340 F.2d 731 (2d Cir. 1965) ("spurious" class actions under old Rule 23); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961) (id.).

The waste of resources of both litigants and the courts in United's rule cannot be overestimated. Because the named plaintiffs have the incentive of gaining a group with which to share attorney's fees and expenses, they can be expected in most cases to appeal an adverse class determination, thereby rendering protective intervention a complete waste of money and effort. But under United's rule, persons excluded by an erroneous, adverse class determination may not rely on the likelihood that the named plaintiffs will seek review. Instead, they must look to intervene on the off-chance that years later the plaintiffs might abdicate. United's rule thus would require excluded class members to "opt-into" the case by protectively intervening before any limitations period could become "untolled" and run, precisely the duplication of effort and expense that representative actions under Rule 23 are designed to avoid.[25] *American Pipe*, 414 U.S. at 553. In addition, after an adverse class determination United's rule would leave helpless the great majority of absent class

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[25] Every step taken by named plaintiffs in this case indicated that they would in fact pursue the class question by appeal after final judgment. The named plaintiffs attempted to gain appellate review by petitioning the Seventh Circuit for permission to take an interlocutory appeal. (A. 62.) Although this was unsuccessful, they had indicated in their petition for permission to appeal that an appeal would be taken from the final decision. (A. 71-72.) During the following three years before entry of final judgment, the named plaintiffs vigorously advanced respondent's interest. They moved for and obtained summary judgment on the question of United's violation of Title VII of its no-marriage rule as well as a determination that they were entitled to reinstatement and compensation for loss of earnings. (A. 88.) Plaintiffs then vigorously prosecuted common questions involved in the computation of damages before a special master and obtained a complex determination on this issue including prejudgment interest and overtime. (A. 91.) Thus, al-

(footnote continued)

members who do not know that they must intervene protectively.[26]

Finally, the evils of stale claims—surprise and prejudice—are avoided without recourse to United's draconian rule. As noted in *American Pipe,* surprise and prejudice are avoided and essential fairness is assured in a class action when, as here, the representative plaintiff in commencing the suit has notified the defendant of the substantive claims being brought and the approximate number and generic identities of persons who may participate in the judgment. 414 U.S. at 553-55.

The only "surprise" to United here was that McDonald, not plaintiffs, prosecuted the class appeal. United is unable to even suggest any prejudice from these circumstances. United has had notice of its potential liability to the class of women who have lost their jobs since this action was commenced. As the court of appeals observed (A. 108), throughout the entire course of this case United had every reason to expect its liability to the class would be enforced through an appeal of the adverse class ruling after final decision. The plaintiffs retained standing to prosecute this appeal, and certainly could have appealed if

(footnote continued)

though the attempt to obtain interlocutory review of the adverse class determination was unsuccessful, there was nothing more conceivably that the named plaintiffs could have done to advance respondent's interests until October 17, 1975, two weeks after judgment, when they informed McDonald they would not appeal.

[26] United cites *Pearson* v. *Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert. denied,* 425 U.S. 912 (1976), for the proposition that no notice need be given of an adverse class determination or of a decision not to appeal. But the lack of notice compels rejection of any rule that means people must intervene protectively within a relatively short time period (here 90 or 180 days) or be time-barred. *See Developments in the Law—Class Actions,* 89 Harv. L. Rev. 1318, 1540-46 (1976).

they had chosen.[27] It is fair to say, as in *Jimenez* v. *Weinberger,* 523 F.2d 689, 701 (7th Cir. 1975), that if the district court had not committed error when it addressed the class question, United years ago would have faced the judgment that it now asks the Court to reverse. With notice of the size of its potential liability and the substantive claims asserted, United cannot claim any prejudice from the delay in appellate correction of the erroneous class action order.

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[27] There is no merit to United's veiled claim that following entry of the final decision the named plaintiffs lacked standing to prosecute an appeal. (Pet. Br. 15). The law is settled that a named plaintiff in a Title VII case may appeal after final decision to obtain review of an adverse class determination even though the individual plaintiff has obtained full redress no further relief. See *Senter* v. *General Motors Corp.,* 532 F.2d 511, 519-20 (6th Cir. 1976) (cases collected); *Jenkins* v. *United Gas Corp.,* 400 F.2d 28, 30 (5th Cir. 1968); *Rosen* v. *Public Service Electric & Gas Co.,* 477 F.2d 90, 94 (3d Cir. 1973). See *Franks* v. *Bowman,* 424 U.S. 747, 751 n.7 (1976).

Nor can it be fairly contended here that plaintiffs "settled" or waived their right to appeal. As seen below (at 34), this was neither explicitly nor implicitly part of the resolution of this lawsuit. To the contrary, as plaintiffs' counsel stated in the district court after entry of the final decision:

> We could on behalf of the class action representatives at the present time, I believe, file a notice of appeal from that original ruling with respect to the class action allegations, but our plaintiffs have chosen not to do so. (A. 100-01.)

It is even incorrect to call the final decision a settlement, which United describes (Pet. Br. 16) as a situation "in which each side gives ground. . . ." There was little if any giving of ground in this case. United had been adjudged guilty of violating Title VII, and plaintiffs had obtained an affirmative order that they were entitled to reinstatement and compensation. While it may be true that defendant at some point began discussions on the actual amounts due, it is hardly accurate to describe this as a "settlement." See *Hiram Ricker & Sons* v. *Students Int'l Meditation Soc'y,* 501 F.2d 550, 553 (1st Cir. 1974).

In *American Pipe,* 414 U.S. at 550, this Court stated "that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined." This rule is equally applicable to a determination made in the appellate court as one made in the trial court, and whether at the instance of a named plaintiff or an excluded class member who has otherwise timely intervened to prosecute the appeal. Since McDonald is concededly a member of the class "as subsequently determined," the filing of this timely class suit commenced the action as to her and all other class members. There was no time bar to her petition to intervene for purposes of obtaining appellate review of the class question, and the judgment below should be affirmed.

B. United's Rule Is Antithetical To Broad Class Relief Required By Title VII And Available Under Rule 23.

In construing the time periods of Title VII and mindful of what this Court later described as the central purpose of Act "to make persons whole for injuries suffered on account of unlawful employment discrimination,"[28] the lower federal courts uniformly have held that the time limits of the exhaustion requirement of section 706(e) would be satisfied for all victims of unlawful discrimination whenever a single employee filed a timely charge with the EEOC and then commenced a class action within the time limits of section 706(f)(1).[29] In approving these rulings in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), this

[28] *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975).

[29] E.g.,*Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711, 720 (7th Cir. 1969); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979, 989 (D.C. Cir., 1973); *United States* v. *Georgia Power Co.,* 474 F.2d 906, 925 (5th Cir. 1973).

Court noted that Congress had plainly ratified this construction of the limitations period of Title VII when it refused to limit class actions in the 1972 amendments to Title VII. 422 U.S. at 414 n.8.

In further recognition of the need for broad class relief in Title VII cases, the lower federal courts have agreed that a named plaintiff in a Title VII case may appeal from a final decision to obtain review of an adverse class determination, even though the individual plaintiff retains no personal claim or has received full satisfaction.[30] This Court has recently noted its approval of these decisions. *Sosna* v. *Iowa,* 419 U.S. 393, 401 n.10 (1975); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 751 n.7 (1976).

It is against this background that petitioner asks this Court to limit class relief in Title VII cases and thereby hold United harmless for its liability to respondent and others similarly situated who have yet to receive a remedy for the injuries they have suffered from United's unlawful employment discrimination.

Under the novel tolling theory urged by United, whenever a district court refuses to allow a Title VII case to proceed as a class action, persons excluded from participation by the adverse class ruling must immediately seek to intervene lest the defendant "buy off" the named plaintiffs[31] and extinguish the possibility of review of the ad-

[30] *E.g., Senter* v. *General Motors Corp.,* 532 F.2d 511, 519-20 (6th Cir. 1976); *Brown* v. *Gaston County Dyeing Machine Co.,* 457 F.2d 1377 (4th Cir. 1972); *Thurston* v. *Dekle,* 531 F.2d 1264 (5th Cir. 1976); *Roberts* v. *Union Company,* 487 F.2d 387 (6th Cir. 1973); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970); *Moss* v. *Lane Co.,* 471 F.2d 853 (4th Cir. 1973).

[31] The plaintiffs in this case were not "bought off," and could, had they so chosen, have appealed from the final decision and obtained reversal of the adverse class determination. See note 27 above.

verse class ruling on appeal from the final decision. The inevitable consequence of this tolling principle would be to narrow the scope of relief available under Title VII whenever a district court incorrectly refuses to allow class relief, unless all members of the aggrieved class individually participate in the district court proceedings.

United's result, although through a different path, was proposed in the "Erlenborn substitute"[32] and rejected by Congress in the 1972 amendments to Title VII. As does United here, Representative Erlenborn would have required all victims of unlawful employment discrimination to participate in district court proceedings in order to obtain relief:

> We would also provide in a class action a limitation so that those who join in the class action or those who by timely motion intervene could be considered as the proper class, but not all who may be similarly situated, but who are not even aware of the fact that a case had been filed. 117 Cong. Rec. 31974 (1971).

This portion of the "Erlenborn substitute" was rejected by the Senate, did not survive the compromise negotiated in conference and was not enacted. See S. Conf. Rep. 92-681, 92d Cong., 2d Sess. 18-19 (1972), *reprinted* in [1972]

[32] The proposed 1972 amendments to Title VII, as approved by a sharply divided House Committee on Education and Labor, would have granted the EEOC broad cease and desist powers without restricting an individual's right to bring a class action. See H.R. Rep. 92-238, 92d Cong., 1st Sess. (1971), reprinted [1972] U.S. Code Cong. & Ad. News 2237. The "Erlenborn substitute" eliminated the cease and desist power, fashioned a two-year statute of limitations on back pay and would have restricted class actions. See the remarks of Rep. Erlenborn, 117 Cong. Rec. 31973-74 (1971).

U.S. Cong. Code & Ad. News 2179, 2183; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 414 n.8 (1975).

Congress was plainly aware of the need to protect employers from the assertion of stale claims[33] but simply did not consider the time when suit was filed after EEOC exhaustion as a barrier needed to prevent their assertion.[34] As reflected in the refusal of Congress in 1972 to limit class actions and in its 1972 enactment of section 706(b), 42 U.S.C. §2000e-5(b), which required notice of the filing of an EEOC charge to be promptly served upon the employer, Congress determined that there was sufficient protection against stale claims in a two-year limit on back pay coupled with the requirement of the filing of an EEOC charge by a single employee on behalf of an aggrieved class "within 180 days after the alleged unlawful employment practice," section 706(e), 42 U.S.C. §2000e-5(e). There is no dispute in this case that such a charge was timely filed and that there was compliance with the

[33] See H.R.Rep. 92-238, 92d Cong., 2d Sess. 66 (1972), reprinted in [1972] U.S. Code Cong. & Ad. News 2237, 2275:

> To avoid the litigation of stale charges and to preclude respondents from being subject to indefinite liabilities, it is clear that a precise statute of limitations is needed. In view of the tremendous backlog currently existing at the EEOC, and the failure to require a prompt serving of the charges on named respondents as discussed hereafter, equitable principles require a limitation on liability.

[34] Congress plainly rejected the date of the commencement of suit as controlling a limitations period. In the 1972 amendments to Title VII, the House had enacted a provision limiting back pay awards to two years prior to the filing of a lawsuit; the Senate rejected this limitation in favor of a two year period to be computed from the filing of an EEOC charge, and the Senate version was enacted. See S.Conf.Rep. 92-681, 92nd Cong., 2d Sess. at 18-19 (1972), reprinted at [1972] U.S. Code Cong. & Ad. News 2183.

30-day prerequisite for suit of section 706(e)(1), 42 U.S.C. §2000e-5(e)(1) (amended 1972). United's tolling principle simply has no place within the statutory framework of Title VII and must be rejected. See *Electrical Workers* v. *Robbins & Myers, Inc.*, 45 U.S.L.W. 4068, 4070 (Dec. 20, 1976).[35]

C. The Type Of Settlements Encouraged By United's Rule Would Frustrate The Policies Of Title VII.

United contends that its construction of Title VII and Rule 23 is required to foster settlements. (Pet. Br. 16.) Apparently United believes that the possibility of reversal on appeal of a refusal to certify a class inhibits a defendant

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[35] We note the similarity between United's policy arguments (Pet. Br. 16-17) and the arguments advanced by Gerald Smetana at the hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 2515, in October, 1971:

> Since the range of such a respondent's liability can extend to unnamed and unknown persons, respondent cannot enter into a voluntary settlement agreement without risking a potential liability far greater than that which he hopes to settle through voluntary compliance. It seems perfectly reasonable to assume that the inhibition to voluntary settlement created by the lack of any limitation to the class for whom recovery can be obtained has caused the enormous backlog of cases presently pending before the Commission. Since voluntary adherence to the provisions of the Civil Rights Act is the only truly effective way in which total compliance with the law can be obtained, every effort should be made to remove those impediments which stifle voluntary compliance. Failure to limit the class for whom recovery can be obtained to those persons specifically named in the charge has such an inhibiting effect upon voluntary compliance. See Hearings at 261-62.

These arguments, of course, were rejected when Congress refused to limit class actions in the 1972 amendments to Title VII. See above at 31.

from settling and that the Court should fashion a rule time-barring the erroneously excluded class members. But where a class suit is brought and class status is denied in the trial court, both parties are on notice—especially here, where the error in denying the class was so obvious—that an excluded class member might appeal the decertification order. If defendant is willing to compromise his defenses to the individual plaintiffs only if they are barred from seeking review of the adverse class determination, it is a simple matter to negotiate for a term making the payment of settlement funds conditional, effective thirty-one days after the final decision when appeal rights will have lapsed. Failing this, a defendant can still buy its peace with the individual plaintiffs.

The type of settlement which United wants to encourage, while not presented by the facts of this case, would strike at the core of Title VII. United seeks a rule which would encourage settlements if, and only if, a district court has erroneously refused to allow a Title VII case to proceed as a class action. Under United's rule, the defendant could then wait 90 to 180 days, convince the named plaintiffs to agree not to appeal from the final decision to obtain relief for the excluded class members in exchange for a generous settlement of their individual claims. In United's view, the consequence of such a settlement would be to bar by a statute of limitations any subsequent recovery for the excluded class members.

Any settlement where the putative class representative "sells out" the rights of the class in exchange for personal profit would be contrary to the clear Congressional

policies underlying Title VII. If such a case were presented, we are confident that the settlement would be declared void as against public policy. See Developments in the Law—Class Actions, 89 *Harv. L. Rev.* 1318, 1459-50 (1976). *Cf. EEOC* v. *North Hills Passavant Hospital,* 544 F.2d 664 (3d Cir. 1976). The validity of such a settlement, however, is not presented in this case because the named plaintiffs at no time bargained away their rights to appeal.

United's own actions in this case demonstrate that its rule is not needed to advance settlements. There is nothing in the final judgment order surrendering the right of appeal (A. 90-92), and in fact the decision not to appeal was not made until two weeks after entry of the final order. (A. 105). If United had believed here that it was buying more than a release from the claims of the individual plaintiffs, it would have obtained a term withholding payment of the money awards until after the time for appeal had passed. This at least would have protected such a bargain against an appeal by plaintiffs. To the contrary, United paid over all the moneys before the appealable order of October 3, 1975 was entered, and its willingness to accept this final order with no such assurances belies its agreement.

The novel tolling principle urged by the petitioner in this case strikes at the core of the broad class relief required by Title VII, first by seeking to resuscitate the limitations on class actions rejected by Congress in the 1972 amendments to Title VII, and second by encouraging unwholesome settlements. As we have demonstrated above, this emasculation of Title VII is contrary to familiar principles which have been applied to statutes of limitations, and must be rejected.

CONCLUSION

For the reasons here stated it is respectfully submitted that the judgment of the United States Court of Appeals for the Seventh Circuit now before this Court be affirmed.

THOMAS R. MEITES
33 North Dearborn, Suite 920
Chicago, Illinois 60602

LYNN SARA FRACKMAN
11 South LaSalle, Suite 2200
Chicago, Illinois 60603

KENNETH N. FLAXMAN
5549 North Clark Street
Chicago, Illinois 60640

Attorneys for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-545

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER UNITED AIR LINES, INC.

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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REPLY BRIEF FOR PETITIONER UNITED AIR LINES, INC.

I.

RESPONDENT'S ARGUMENT ACCORDS NO SIGNIFICANCE TO THE TRIAL COURT'S DENIAL OF CLASS ACTION STATUS ON THE QUESTION OF TIMELINESS OF INTERVENTION.

Our position is that the trial court did not err in denying respondent's October 1975 petition to intervene as untimely since respondent had been excluded from the case in December 1972 when class status was denied. We rely on *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538, 561 (1974), which held that the limitations period is tolled upon filing of a class action but "only during the pendency of the motion to strip the suit of its class character."

Respondent replies that our reading of *American Pipe* is "skewed," and that—

> [T]he correct rule after *American Pipe* is that when, as here, an appeal from the final decision results in reversal of the unfavorable class ruling, the statute of limitations remains satisfied for the class by the timely commencement of the class action as though the class had been correctly permitted by the District Court. (Resp. Br. 20.)

We submit that respondent's position is completely circular. The issue is whether respondent was a party entitled to appeal the adverse class ruling—*i.e.*, should the Court of Appeals ever have reached the issue of class denial on respondent's appeal. Respondent's formulation assumes she had the same standing to appeal the adverse class decision three years after she was excluded from the case as would the named plaintiffs and intervenors if they had not settled their claims but had obtained judgment against defendant in October 1975.

Respondent's rule, in fact, makes the question of timeliness and time limits irrelevant. If it be assumed that the Court of Appeals could examine the class question without regard to the status of respondent, then the issue of timeliness would never be a factor. If class denial was correct then putative class members are out of the case for that reason; if class denial is held to be error, then the class is reinstated. Thus the potential class member could appeal the class denial without regard to timeliness of attempted intervention or his or her status as a party.

In short, respondent contends that even though denial of class status in December 1972 "excluded me and others like me from this action" (McDonald Affidavit, A. 95), nonetheless her right to appeal from the class denial upon final disposition three years later persisted as though she were still a party to the action.

The Court of Appeals certainly did not apply respondent's "rule." The Court first examined as an independent issue the timeliness of respondent's petition to intervene in October 1975. We believe the majority decided that question incorrectly by

assuming, contrary to *American Pipe*, that tolling continued after the denial of class status. The point is fully discussed in our main brief, pp. 12-15.

It was only after deciding the question of the timeliness of intervention that the majority concluded it could examine the trial court's decision on class status:

> Because petitioner [respondent here] was entitled to be an intervenor and filed a timely notice of appeal from the final order terminating the litigation, we have power to examine the adverse class ruling. . . . (Court of Appeals Opinion, A. 109.)

Judge Pell in dissent concluded that the petition to intervene was not timely and was properly denied, and concluded, "Since, in my opinion the timeliness issue is dispositive of this case, I have not deemed it necessary to advert to the other issues raised on this appeal." A. 115.

Respondent turns the analysis on its head. She justifies the majority decision on timeliness because of its decision on class. But the Court had to find timeliness before it could reach the class question. The majority, we contend, was wrong on the timeliness question, but at least it proceeded in the proper sequence.[1]

Neither *Burnett* v. *New York Central Rr. Co.*, 380 U. S. 424 (1965), (Resp. Br. 20, 23), nor *Esplin* v. *Hirschi*, 402 F. 2d 94 (10th Cir. 1968), *cert. denied* 394 U. S. 928 (1969), (Resp. Br. 19, 22), supports the "rule" urged by respondent.

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1. In *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F. 2d 501 (3d Cir. 1976), intervention was denied individual white firemen in a Title VII class action suit brought by a group of black firemen. The unsuccessful intervenors then appealed both the denial of intervention and the merits of the trial court's final order covering hiring and promotion. The Court of Appeals upheld the denial of intervention as untimely since the petition to intervene was filed 16 days after the final order. The Court then held that since the intervention was properly denied, the merits of the trial court's order could not be reached. ". . . One properly denied the status of intervenor cannot appeal on the merits of the case [additional citations omitted]." 530 F. 2d at 508.

The filing of an action in the state court in *Burnett* was held to toll the limitations period under the Federal Employers' Liability Act. This was not a class action and the Court noted that "Petitioner did not sleep on his rights but brought an action within the statutory period in a state court of competent jurisdiction." 380 U. S. at 429. *Burnett,* in fact, cuts against respondent. The Court considered the purpose of limitations statutes as being primarily designed to assure fairness to defendants. "Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." 380 U. S. at 428.

The comment of the trial judge here in denying respondent's petition to intervene is precisely to that point:

> Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek any relief from this Court in any way during that period of time, and litigation must end. I must deny the motion. (A. 101.)

In *Esplin* the Court of Appeals examined the propriety of class relief on the appeal of Hirschi, the named plaintiff. We agree that named plaintiffs may appeal class denial after final judgment if they have not waived that right by settling their claims. Pet. Br. 15. It follows that if the appeal is successful, the class is reinstated. *Esplin* so holds—but that is not the issue here. The issue here is the right of a non-party to start again a lawsuit settled by the named parties and intervenors in order to get relief which is otherwise barred by the statute of limitations.

Respondent argues that intervention after judgment for purpose of appeal is "an old and well-established procedural device." Resp. Br. 15. The contention is beside the point. The cases cited by respondent concerned intervention as of right under Rule 24(a). Intervention here, if possible at all, would have to be permissive under Rule 24(b), as the Court of Appeals recognized. A. 106. The final order of dismissal did not affect Ms. McDonald's interest with respect to the issue of the legality of

the no-marriage policy, since that had been decided in *Sprogis* and was no longer a contested issue in *Romasanta,* the case here.

The interest which Ms. McDonald sought to protect by her intervention and appeal here was the right to obtain a remedy within the framework of this litigation after she had delayed her attempt to intervene for three years after class denial. That she may lose the right to a remedy because of the passage of time is not the kind of interest she is entitled to protect through appeal from the final order of dismissal which simply ratified the settlement of claims of named plaintiffs and timely intervenors.[2] What she really seeks is classic "one-way intervention," which the amendments to Rule 23 were designed to eliminate. *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538, 547 (1974).

Had respondent petitioned to intervene at the time of class denial she could have urged the trial court to modify the order on class status and, if unsuccessful, could have appealed the denial of intervention.[3] The trial judge pointed this out during hearing on the petition to intervene in October 1975. "She never even sought to appeal that order [of December 6, 1972, denying class status]. She never sought to come in at any time and ask for a modification." A. 100.

We do not understand the significance of respondent's reference to the "Erlenborn substitute" rejected by the Senate in 1972. Resp. Br. 30. If adopted, requirements for class actions

2. "The district court order dismissing the litigation, pursuant to the terms of the stipulation did not prejudice the rights of individuals [potential class members] who were not parties to the litigation at the time of dismissal." *Pearson* v. *Ecological Science Corp.,* 522 F. 2d 171, 177 (5th Cir. 1975), cert. denied 425 U. S. 912 (1976). Charges of "sell-out" because of settlement after class denial were also made in *Pearson.* The Court held that named plaintiffs had no fiduciary duty to potential class members after class denial. *Pearson* is more fully discussed in our main brief, pages 13-16.

3. An order denying intervention is final and appealable. *EEOC* v. *United Air Lines,* 515 F. 2d 946-48 (7th Cir. 1975).

under Title VII would have been more restrictive than under Federal Civil Procedure Rule 23. That it was rejected only means that the requirements of Rule 23 are still applicable in Title VII cases.

American Pipe "involve[d] an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts." 414 U. S. 538, 540. It held that the applicable limitations period was suspended for all potential class members on the filing of a class action but "only during the pendency of the motion to strip the suit of its class action character." Eleven days of the statutory period remained after denial of class, and the motions to intervene were filed on the eighth day. ". . . [I]t follows that the motions were timely." 414 U. S. at 561.

This must mean that if the motions were filed on the twelfth day they would not have been timely. There is no other reading possible. It establishes a clear rule, easily administered by the district courts as they struggle with the difficulties presented by class actions.[4]

4. Respondent repeatedly refers to petitioner's "novel tolling principle," "United's rule," and "United's draconian rule." Resp. Br. 13, 20, 25, 26, 29, 32, 34. We had thought the principle advocated in our brief was clearly implied in *American Pipe* and not a rule of our making. "The holding in *American Pipe* cuts both ways." *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co.*, 511 F. 2d 1073, 1078 (10th Cir. 1975). "Under *American Pipe*, the intervention does not relate back to the date of original filing by analogy to cases under original Rule 23 brought as 'spurious' class actions, and the petition must be filed within the remaining time under the statute of limitations measured from the date of the order denying certification." 3B Moore, Federal Practice (1976-77 Supp.) ¶ 23.90 at 173. See also *Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171, 178 (5th Cir. 1975), discussed at Pet. Br. 13-16. The federal trial court in the Southern District of New York recently adopted a similar reading of *American Pipe*. *Stull* v. *Bayard*, 75 Civ. 3782 (January 7, 1977). Since the decision is not reported, we quote at some length (Slip Opinion 12-14):

> [Plaintiff] is not within the *American Pipe* principle of tolling. He did not move (timely or not) to intervene in the then

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Despite the tremendous burdens which class actions have placed upon the judiciary and upon defendants who become embroiled in such litigation, respondent McDonald asks the Court to adopt, as a general rule of law applicable in class actions, the principle that once a class action pleading is filed, potential class members may attempt to resuscitate the class action at any time, even though the class status has been denied years before their tardy attempts to intervene, even though years of litigation

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> pending second Lillian action after class action status had been denied to that action. [Plaintiff] went counter to and defied the *American Pipe* principle by commencing a separate and independent action, thus increasing the volume of federal litigation and defeating the economy and efficiency which it was the object of the present class action Rule 23 to bring about.
>
> There is no square authority on the point, but in my view a member of a class, on whose behalf a class action has been commenced, may not bring a separate, independent action after his individual claim has been time barred. *His sole remedy, under American Pipe, is a timely motion to intervene in the class action after class action status has been denied;* only if he does so, is the statute of limitations tolled as to him.
>
> * * * * *
>
> . . . There is nowhere in [*American Pipe*] any suggestion that a separate independent action by a class member could be maintained. The opinion emphasized that its interpretation of the class action Rule 23 was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve" (414 U. S. at 558). It certainly would not effectuate "litigative efficiency and economy" to permit any number of separate independent actions by class members on time-barred claims. The separate opinion of Mr. Justice Blackmun points out that the *American Pipe* principle will not unduly encourage the assertion of stale claims because these can only be asserted through intervention either as of right or as an exercise of the Court's discretion and that the *American Pipe* decision does not "necessarily guarantee intervention for *all* members of the purported class." 414 U. S. at 561. (Emphasis supplied.)

Whether or not one may alternatively file an independent action after class denial is not at issue here; the point is that immediate legal action is necessary after class status is denied.

have interposed, and even though the litigation has terminated to the satisfaction of all parties actually involved.

We submit that respondent's view is inconsistent with Rule 23, clearly contrary to the principles set forth in *American Pipe* and, if adopted, would hopelessly confuse and complicate the management of litigation under Rule 23.[5]

II.

RESPONDENT'S ATTACKS ON PETITIONER'S MOTIVES, CONDUCT AND ARGUMENTS ARE NOT SOUND.

Respondent's brief is replete with inaccuracies and innuendoes concerning petitioner's motives, conduct and arguments. These are in the main irrelevant to the issues before the Court. Although mindful of the Court's concern about undue proliferation of written material submitted to it, we are compelled to respond to some of these comments lest our failure to do so be taken as admissions.

1. The Right of Named Plaintiffs to Appeal Class Status Denial.

Respondent contends the named plaintiffs could have appealed the final order of dismissal, and disputes petitioner's contention that because of the settlement and agreed order of

5. As we have elsewhere noted (Pet. for Writ of Cert. 8, n.6), the Court of Appeals test of timeliness (which differs from that now advanced by respondent, *supra,* pp. 2-3) is equally unworkable. That makes the running of the limitations period dependent on the subjective state of mind of the potential class member attempting to intervene as to his or her expectations of plaintiffs' intent to appeal after final order. This test invites a separate judicial inquiry into such questions as the intervenor's knowledge of the proceedings, when the intervenor may have first learned of plaintiffs' intent, and whether the intervenor's conclusion was reasonable in light of peculiar factors such as the denial of attorney fees in *Sprogis.* See Pet. Br. 20, n.18. This approach would also mean that intervention might be timely for some potential class members and not for others because of varying experiences and expectations.

dismissal named plaintiffs could not appeal.[6] Resp. Br. 27, n.27. Respondent suggests there was really no settlement, and erroneously states that the Special Master who recommended a monetary award in *Sprogis* participated in the monetary awards in this case. Resp. Br. 10. The order of October 3, 1975 dismissing the case states "counsel for the parties in this case negotiated settlements of the claims of [named plaintiffs and intervenors]." The order then stated that the complaints of these parties "are hereby dismissed with prejudice, all matters in controversy with respect to such claims having been settled and resolved." The complaint of one other intervenor was dismissed with prejudice, and that was based on that intervenor's motion for leave to withdraw and waive any claim to relief. A. 91, 92. Respondent quotes counsel for the named plaintiffs and intervenors to the effect that he believed plaintiffs could thereafter have appealed, "but have chosen not to do so." Resp. Br. 27, n.27 What is omitted is counsel's further statement to the trial court: "They have settled their individual claims and consequently the original class action representatives are not in a position to take the appeal." A. 100-1.

We simply do not understand how respondent has the temerity to state that the Special Master participated in the process, that this was not a settlement, and that the named plaintiffs could appeal after agreeing to an order of dismissal with prejudice.[7]

6. On our view of the case, whether named plaintiffs could have appealed class denial and chose not to do so, or could not have appealed because of the settlement and agreed dismissal with prejudice, is irrelevant here. In either case, respondent would not have the right to appeal class denial since the statutory period had long since run as to her. The difference is critical to respondent, however, since she defends her lack of earlier action on the ground she was relying on an expectation that named plaintiffs would, and therefore could, appeal.

7. In the text and footnote 30 on page 29 of her brief, respondent cites a number of cases to the proposition that a named plaintiff may appeal an "adverse class determination" even where the plaintiff has "no personal claim or has received full satisfaction." The cited cases do not support the proposition. They involve rather

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2. The No-Marriage Policy.

Respondent states that "although this discriminatory 'no-marriage' policy became unlawful in 1965 on the effective date of Title VII of the Civil Rights Act of 1964 . . . United retained the rule until November, 1968." Resp. Br. 4. The clear implication is that United deliberately persisted in a policy it knew to be a violation of Title VII for three years after the policy became unlawful. We accept, as we must, the decision of *Sprogis* v. *United Air Lines*, 444 F. 2d 1194 (7th Cir. 1971), that the no-marriage policy was a violation of Title VII and the propriety of that ruling is not in issue here. However, the violation was not as obvious as respondent implies. The *Sprogis* decision was by a divided court, with Judge (now Justice) Stevens agreeing with United's position that the discrimination inherent in the no-marriage policy was based on marital status—not proscribed by Title VII—and not on sex. In January of this year the Court of Appeals for the Fifth Circuit held that the Delta Air Lines no-marriage policy for flight attendants was not a violation of Title VII precisely on the grounds articulated by Judge Stevens. In so doing the Fifth Circuit expressly rejected the reasoning of the majority in *Sprogis*. *Stroud* v. *Delta Air Lines*, 544 F. 2d 892, 894 (5th Cir. 1977). Thus, there is now a split between the Fifth and Seventh circuits on the basic issue of whether the no-marriage policy was ever a Title VII violation.

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efforts of a class representative to appeal the denial of relief to unnamed class members where a class has been certified or situations in which class has been denied solely because the class representative may not be entitled to relief. Typical is *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), cited by respondent at pages 14, 27 and 29. There the Court held that an appeal challenging denial of relief to the unnamed, but identifiable, class members by the class representative was not moot because the class representative himself might not have been entitled to relief. There the class was certified, there was no settlement, and the issue was mootness, not standing to appeal.

3. Petitioner's Failure to Consolidate.

United's defense of the various suits brought against it by individual flight attendants is criticized as its "herculean efforts to escape its obligations to respondent McDonald and others similarly situated." Resp. Br. 2. United is faulted because it did not attempt to transfer and consolidate similar claims "from members of a numerous class." Its defenses are described as "technical" and its successes as "procedural". Resp. Br. 2, n.1, 3. We were not aware that United had the obligation to concede the validity of class allegations or to move to consolidate individual suits. The question really suggested by these various suits is why other flight attendants were not as sanguine as was respondent here about asserting their own interests and why they did not—as did Ms. McDonald—simply wait for seven years before coming forward. It was respondent's own inaction—not United's "herculean effort"—which is responsible for her present situation.

4. The Claimed Class.

Respondent takes some liberties in describing the number of members in the alleged class. At page 4 of her brief, it is "estimated" to be over 160. At page 14, there are "over one hundred and sixty women who were the victims" of the no-marriage policy. In support of this number, respondent refers to a statement in the majority opinion that "Petitioner and 140 other stewardesses were thus excluded from the case." Respondent ignores the court's footnote to this statement: "The figure is derived from p. 2 of petitioner's [respondent here] main brief and p. 13 of the EEOC's brief and *may be excessive*. Defendant asserts there are only 30 in this class (defendant's main brief 50)." A. 105, n.2. (Emphasis added.) When faced with the same overstatement in the Court of Appeals we pointed out that respondent based her estimate on a computer printout

given to named plaintiffs during discovery for the period January 1966 through December 1971 showing terminations of flight attendants for all reasons, not solely marriage. Respondent persists in this overstatement, citing as authority the Court of Appeals opinion which, in turn, is based on respondent's own inaccurate statement.

Elsewhere in her brief respondent argues that the surprise and prejudice to a defendant arising out of stale claims are not here present since the filing of the suit notified United of the "approximate number" of persons "who may participate in the judgment." Resp. Br. 26. But here respondent failed to point out that the complaint alleged that the claimed class numbered "approximately twenty-seven or twenty-eight other such discharged stewardesses" (Comp. Par. 3, A. 11)—not the 160 claimed by respondent.

5. The Propriety of the Trial Court's Ruling on Class Status.

Respondent describes the class ruling of the trial court as "plainly wrong" (Resp. Br. 20), "obvious error" (Resp. Br. 33), and states that United "does not dispute that the district court erred in refusing to fashion class relief for respondent and others similarly situated." (Resp. Br. 12.) That United did not raise in its petition that part of the majority decision reversing class denial does not mean we agree the district court erred.[8] The issue here is not whether the district court

8. In our opinion, the trial court correctly decided the class issue. Both the Court of Appeals majority and respondent here misstate the basis on which the trial court acted in order to lend credence to their conclusion that the trial court erred. Both the majority and respondent claim the trial court denied class status on the judge's mistaken view that each potential class member had to meet the jurisdictional requirements of Title VII by filing charges with the EEOC. Opinion, A. 109; Resp. Br. 20, n.18.

This is a patent misreading of the trial judge's order of December 6, 1972. If that had been his view of the law, he would not have permitted intervention by any of the 13 former flight attendants he

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erred in this respect; the issue is whether the Court of Appeals had the "power to examine the adverse class ruling" as it concluded it did because it found respondent's petition to intervene to be timely despite *American Pipe*. In fact, the majority of the Court of Appeals was quite cavalier in its consideration of the class question and has created a host of potential administrative problems for the trial court if its decision is permitted to stand. See Pet. Reply to Br. in Opp. to Pet. for Writ of Cert. 2, n.1; Pet. Br. 17, n.12. Whether the trial court was right or wrong in its class determination is not the question here; rather it is whether the Court of Appeals should have decided that question on this appeal.[9]

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did allow in the case, for none had satisfied all and most had met none of the Title VII jurisdictional requirements.

What the trial court did require was a showing of interest in continued employment. The judge had expressed concern about "one way intervention," since the legal issues had long since been settled. "It appears to the court intervenors should be limited to those who protested, did not settle and were truly interested in employment." A. 57. In explication—

> In considering the equities, it does not seem fair and reasonable to this court that it should allow a stewardess terminated prior to November 7, 1968 to intervene here unless she indicated in a timely manner her desire to continue working by taking some affirmative action to protest United's policy or seek reinstatement. A. 60.

This was in December 1972. And yet respondent McDonald—with knowledge that this order excluded her from the case (A. 95)—made no move until three more years had passed.

9. Respondent now appears to contend that the denial of class action by the trial court in *Sprogis* after remand from the Court of Appeals (see Pet. Br. 4-5) was also error. Resp. Br. 6, n.4. If that is respondent's position, then she should have attempted to intervene after the denial of class action status in that case. Ms. Sprogis, represented by the same counsel representing plaintiffs and intervenors in this case, did appeal the final order of June 1974 in that case, but only on the issue of denial of attorney fees. *Sprogis* v. *United Air Lines*, 517 F. 2d 387 (7th Cir. 1975). Pet. Br. 5, n.3.

6. Respondent's Efforts to Make Known Her Claim.

Respondent takes issue with United's assertion that although respondent was terminated in September 1968 she did not make her claim for reinstatement and back pay known until October 1975 when she filed her petition to intervene. This assertion, claims respondent, is without record support. Resp. Br. 10. Respondent attempts to refute this claim by noting that Ms. McDonald's name appeared on a computer printout, and further (and without record support) "McDonald twice contacted United to attempt to regain her position." Resp. Br. 10, n.8.

Respondent's name on a computer printout of former employees conveys nothing about the employee's claim concerning the termination. The printout included the names of employees terminated and resigned between 1966 and 1971 for all kinds of reasons. It was an historical record of the names of past employees, not a grievance roster.

Respondent's assertion that she twice contacted United is particularly distressing. United made the identical claim about respondent's inaction in both brief and argument in the Court of Appeals. During argument, counsel for McDonald asked for and was granted leave to file a post-argument memorandum to this point, and did so. That memorandum, part of the record in the Court of Appeals, made no claim that McDonald ever attempted to contact United prior to the filing of the petition to intervene in October 1975. It merely asserts that United's statement "is unsupported by any record cites and is untrue." United has approximately 50,000 employees. We do not know how we could support the negative of the proposition if indeed we had such an obligation. But Ms. McDonald filed an affidavit in support of her petition to intervene in which she did not allege that she took any affirmative action to assert her claim during the intervening seven year period but rather that she relied on what others were doing. "Since the legality of the no-

marriage policy was being challenged in proceedings that I thought would govern my situation, I did not myself file a discrimination charge against United or grievance under the collective bargaining agreement." A. 95. If McDonald had misspoken or left something out of her affidavit the Court of Appeals gave her the unusual opportunity to correct that omission after argument. She did not. Her present claim that the record does not support our assertion that she took no action until October 1975 is frivolous.

CONCLUSION.

In the final analysis, this Court will advise us whether a potential class member such as respondent McDonald can sit back for seven years after termination of employment, five years after suit has been started, and three years after class denial, waiting until all issues are decided and disposed of, and then come forth to intervene, appeal and start the process all over. To allow her to do so would be to allow again the "one-way intervention" which Rule 23 was designed to eliminate. *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538, 547 (1974.) To permit this would be unfair and prejudicial to a defendant, like United, who should be reasonably able to assume after the passage of so many years that its exposure has ended. The trial court, after the extensive time and effort spent on this case and the related *Sprogis* case, "ought to be relieved of the burden of trying stale claims when [this respondent] has slept on [her] rights." *Burnett* v. *New York Central Rr. Co.,* 380 U. S. 424, 428 (1965).

For the foregoing reasons and for the reasons set forth in our main brief, we respectfully request that the decision of the Court of Appeals be reversed and that the decision of the

district court of October 21, 1975, denying the petition of respondent to intervene, be affirmed.[10]

Respectfully submitted,

STUART BERNSTEIN,
JAMES W. GLADDEN, JR.,
SUSAN S. SHER,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604.
March 22, 1977.

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10. Respondent has submitted to the Court by letter dated March 16, 1977, a copy of the decision of the Court of Appeals for the District of Columbia in *Knable* v. *Wilson,* Nos. 75-1655, 1656 (March 9, 1977). There the Court denied to named plaintiffs the right to appeal immediately after class denial. In urging application of the "death knell" doctrine, the named plaintiffs argued that potential class members were now time barred and could not institute their own suits, and that named plaintiffs might prevail individually and satisfactorily on their claims and have no incentive to appeal class denial after judgment. The Court responded by pointing out that there was no "threat of extinction to the named plaintiffs' individual damage claims attributable to a possible time barrier for those who may have slept on their rights." Slip Op. 13. To the second argument—and apparently the point in the decision which induced respondent to submit this case—the Court stated that "the fate predicted for the latter is not inexorable. The jurisprudence of this circuit offers generously the possibility that, on the contingency postulated, unnamed claimants would be allowed to intervene for the purpose of taking the appeal." Slip Op. 14. To the extent this can be construed as other than dictum, the two responses by the Court appear inconsistent. It is apparent that the named plaintiffs had accurately gauged and were concerned about the impact of *American Pipe* resulting from the inaction of "those who have slept on their rights." Further, the cases cited by the Court to the "generosity" of

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the circuit did not involve class action. Two of these have been cited in respondent's brief and are generally distinguished at pages 4-5, *supra. Smuck* v. *Hobson,* 408 F. 2d 175 (D. C. Cir. 1969), held that parents had the right to intervene as of right under Rule 24(a) and appeal an order against the Board of Education affecting district policies where the Board itself decided not to appeal. In *Wolpe* v. *Poretsky,* 144 F. 2d 505 (D. C. Cir. 1944) cert. denied 323 U. S. 777 (1944), a zoning commission whose order affecting a parcel was held void decided not to appeal. The adjoining adversely affected property owners were allowed to intervene as of right. The third cited case, *Zuber* v. *Allen,* 387 F. 2d 862 (D. C. Cir. 1967), recites the formal order without opinion and is somewhat cryptic. It apparently permitted an individual adversely affected by an order against the Secretary of Agriculture to intervene for appeal purposes if the Secretary did not appeal. None of the cited cases concerned Rule 23. If the Court of Appeals intended its comments to be a definitive ruling on the right of potential class members to intervene to appeal class denial after a final order—as it clearly did not since no potential class members were before the Court—then there is another conflict with *American Pipe* along with the decision of the Seventh Circuit in this case.